





THE LAW
OF
CARRIERS OF PASSENGERS.

ILLUSTRATED BY

LEADING CASES AND NOTES.

BY
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*Author of "Law of Negligence," "Homesteads and Exemptions,"
"Liability of Stockholders," etc.*

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TO THE

HONORABLE SAMUEL TREAT, LL.D.,

UNITED STATES DISTRICT JUDGE:

For thirty consecutive years you have occupied a seat upon the judicial bench, where you have administered justice without ostentation, with impartiality, learning, and diligence. This long and honorable public career has deserved and secured for you the admiration of the legal profession and the respect and gratitude of your fellow-citizens. It is not a trivial custom which enables me to close a somewhat laborious task by offering a tribute to your worth as a jurist, a citizen, and a friend, and by expressing the wish that the strength of body and mind, which has enabled you to bear up successfully for so many years under the very great labors and trials of your office, may be spared to you for many years to come.

P R E F A C E.

This book embodies an effort to look somewhat closely into a subject which, since the introduction of steam as a means of transit, has acquired considerable importance in the law. An attempt has been made to collect and cite all cases bearing on the subject, except a few which pertain exclusively to State regulation of fares, a subject which belongs to carriers of goods and warehousemen as well as to carriers of passengers. The plan of this work is the same as that of the author's work on "Negligence," and the table of cases embraces a concordance of citations constructed on the same plan. The notes are designed to contain a complete treatise on the law of carriers of passengers, and the select cases printed at the head of each chapter are used merely as a text introducing the notes. The book is thus designed to give the practitioner the advantage of a number of leading cases, combined with a treatise, upon a considerable title of the law. In constructing the notes, fine writing has not been aimed at, but a constant effort has been made to attain substantial accuracy. If the practitioner shall find in this volume any aid to his labors, it is desired that he should accord a large share of the credit to Mr. Edwin G. Merriam, to whose analytical skill and painstaking industry its completion in its present form is largely due. It is also a pleasure to state that Mr. Frank W. Peebles and Mr. William L. Murfree, Jr., who assisted the author in his previous work, have rendered valuable assistance upon this.

TABLE OF CONTENTS.

CHAPTER I.

	Page
OF THE OBLIGATIONS TO RECEIVE AND CARRY	1-30

CHAPTER II.

WHEN THE RELATION OF CARRIER AND PASSENGER SUBSISTS	31-52
---	-------

CHAPTER III.

OF THE OBLIGATION OF THE CARRIER TO CARRY ACCORDING TO ADVERTISEMENT OR CONTRACT	53-71
---	-------

CHAPTER IV.

OF THE OBLIGATION OF THE CARRIER TO FURNISH SAFE AND CONVENIENT STATIONS AND APPROACHES	72-110
--	--------

CHAPTER V.

LIABILITY OF THE CARRIER FOR NEGLIGENCE	111-242
---	---------

CHAPTER VI.

CONTRIBUTORY NEGLIGENCE OF THE PASSENGER	243-272
--	---------

CHAPTER VII.

APPLICATION OF THE DOCTRINE OF IMPUTED NEGLIGENCE IN THE CARRIAGE OF PASSENGERS	273-294
--	---------

CHAPTER VIII.

POLICE DUTIES OF THE CARRIER	295-305
	(vii)

CHAPTER IX.

	Page
REGULATIONS OF THE CARRIER	306-351

CHAPTER X.

LIABILITY OF THE CARRIER FOR ASSAULTS UPON PASSENGERS BY HIS SERVANTS	352-377
--	---------

CHAPTER XI.

CONTRACTS LIMITING CARRIER'S LIABILITY FOR PERSONAL INJURIES	378-402
---	---------

CHAPTER XII.

USE OF ANOTHER'S MEANS OF TRANSPORTATION — LIABILITY OF CARRIER TO PASSENGER FOR CONSEQUENTIAL INJURIES	403-418
--	---------

CHAPTER XIII.

LIABILITY OF CARRIER FOR DAMAGE TO PASSENGER THROUGH DEFAULT OF CONNECTING LINES	419-437
---	---------

CHAPTER XIV.

STREET-RAILROAD COMPANIES	438-447
-------------------------------------	---------

CHAPTER XV.

CARRIERS OF PASSENGERS BY WATER	448-487
---	---------

CHAPTER XVI.

LIABILITY OF CARRIER IN RESPECT OF PASSENGER'S BAGGAGE	488-539
--	---------

CHAPTER XVII.

REMEDIES, PROCEDURE, AND DAMAGES	540-585
--	---------

TABLE OF CASES PRINTED IN FULL.

	Page
Bass <i>v.</i> Chicago and North-Western Railway Company	311
Benett <i>v.</i> Peninsular and Oriental Steamboat Company	448
Bennett <i>v.</i> Dutton	2
Bennett <i>v.</i> New Jersey Railroad and Transportation Company .	281
Burns <i>v.</i> Bellefontaine Railway Company	441
Candee <i>v.</i> Pennsylvania Railroad Company	419
Chamberlain <i>v.</i> Chandler	459
Chicago, Burlington, and Quincy Railroad Company <i>v.</i> Parks .	319
Christie <i>v.</i> Griggs	181
Cornman <i>v.</i> Eastern Counties Railway Company	76
Crafter <i>v.</i> Metropolitan Railway Company	88
Curtis <i>v.</i> Rochester and Syracuse Railroad Company	188
Day <i>v.</i> Owen	306
Denton <i>v.</i> Great Northern Railway Company	53
Dunn <i>v.</i> Grand Trunk Railway	328
Great Western Railway Company <i>v.</i> Blake	403
Great Western Railway Company <i>v.</i> Pocock	63
Hawcroft <i>v.</i> Great Northern Railway Company	59
Hegeman <i>v.</i> Western Railroad Corporation	160
Hollister <i>v.</i> Nowlen	489
Ingalls <i>v.</i> Bills	112
Jencks <i>v.</i> Coleman	11
Jones <i>v.</i> Boyce	246
Longmore <i>v.</i> Great Western Railway Company	81
McCall <i>v.</i> Forsyth	541
McDonald <i>v.</i> Chicago and North-Western Railroad Company . .	93
McElroy <i>v.</i> Nashua and Lowell Railroad Corporation	409
Morrissey <i>v.</i> Wiggins Ferry Company	243
New York Central and Hudson River Railroad Company <i>v.</i> Fraloff	502

	Page
Nicholson <i>v.</i> Lancashire and Yorkshire Railway Company . . .	85
Nolton <i>v.</i> Western Railroad Corporation	37
O'Brien <i>v.</i> Boston and Worcester Railroad Company	22
Pearson <i>v.</i> Duane	17
Pendleton <i>v.</i> Kinsley	352
Philadelphia and Reading Railroad Company <i>v.</i> Derby	31
Pittsburgh, Fort Wayne, and Chicago Railway Company <i>v.</i> Brig- ham	101
Pittsburgh, Fort Wayne, and Chicago Railway Company <i>v.</i> Hinds	295
Quimby <i>v.</i> Vanderbilt	423
Railroad Company <i>v.</i> Aspell	252
Railroad Company <i>v.</i> Jones	248
Railroad Company <i>v.</i> Lockwood	378
Readhead <i>v.</i> Midland Railway Company	124
Steamboat New World <i>v.</i> King	175
Stokes <i>v.</i> Saltonstall	183
Thorogood <i>v.</i> Bryan	273
Thurston <i>v.</i> Union Pacific Railroad Company	10
Toomey <i>v.</i> London, Brighton, and South Coast Railway Company	72
Vinton <i>v.</i> Middlesex Railroad Company	6
Wilton <i>v.</i> Middlesex Railroad Company	438

TABLE OF CASES CITED.

~~42~~ In this table of cases the letters **c**, **d**, **o**, and the interrogation point (?) indicate as follows:—

c—That the foregoing case is cited in judicial opinions at the pages of the reports following.

d—That its authority is there distinguished.

?—That its authority is there questioned.

o—That its authority is there denied, or the case overruled.

The cases printed in *italic* are published in full in this volume.

A.

Abbott v. Bradstreet, 55 Me. 530. pp. 305, 518.

c 118 Mass. 277; 17 Am. L. Reg. (N. S.) 510; 72 N. Y. 56; 6 Reporter, 55.

Aberfoyle (The), Abb. Adm. 242; s. c. 1 Blatchf. 360. pp. 362, 467.

c 6 Ben. 371; 1 Blatchf. 553.

Achtenhagen v. Watertown, 18 Wis. 331. p. 552.

c 33 Wis. 72; 22 Wis. 248; 42 Wis. 600; 41 Wis. 109; 19 Wis. 497; 39 Wis. 137. **?** 34 Wis. 362, 363.

Ackerson v. Erie R. Co., 32 N. J. L. 254. p. 575.

c 57 Me. 251.

Adams v. Carlisle, 21 Pick. 146. p. 551.

c 110 Mass. 50; 1 Bradw. 422; 4 Gray, 180, 335, 401; 19 Conn. 576; 10 Metc. 365; 18 N. Y. 252; 15 Gray, 580; 1 Allen, 190; 8 Gray, 132; 13 Metc. 299; 2 Woodb. & M. 345; 27 Vt. 465; 20 N. Y. 72; 26 Me. 240; 32 Me. 53; 3 La. An. 646; 35 N. H. 276; 12 Metc. 418; 7 Gray, 97; 11 Metc. 463; 40 N. H. 416; 5 Gray, 73.

Adams v. Lancashire etc R. Co., L. R. 4 C. P. 739. pp. 229, 263. •

c 44 L. J. (Q. B.) 114; L. R. 10 Q. B. 275; L. R. 3 Adm. 479. **?** L. R. 8 Q. B. 165, 166, 167, 168, 169, 173, 176; 42 L. J. (Q. B.) 107.

Adams Express Co. v. Haynes, 42 Ill. 89. p. 386.

Adams Express Co. v. Perkins, 42 Ill. 458. p. 386.

Adderley v. Cookson, 2 Camp. 15. p. 468.

Adwin v. New York etc. R. Co., 60 Barb. 590. p. 339.

Alden v. New York etc. R. Co., 26 N. Y. 102; s. c. 3 Am. L. Reg. (N. S.) 498. pp. 158, 199, 357.

c 47 Barb. 252; 3 Cliff. 422; 47 N. Y. 287; 53 N. Y. 159. **d** 44 N. Y. 480, 481, 482, 483, 487, 488. **?** L. R. 4 Q. B. 392. **o** 64 Pa. St. 229.

Aldworth v. Stewart, 14 L. T. (N. S.) 862; s. c. 4 Fost. & Fin. 957. p. 365.

Alger v. Lowell, 3 Allen, 402. p. 271.

Allen v. London etc. R. Co., L. R. 6 Q. B. 65. p. 372.

Allen v. Mackay, 1 Sprague, 219. p. 487.

Allen v. Willard, 57 Pa. St. 374. p. 552.

c 85 Pa. St. 254; 29 Iowa, 48; 51 Ala. 570; 48 How. Pr. 48; 61 N. Y. 184; 79 Pa. St. 302; 40 Iowa, 345; 86 Pa. St. 159.

Allender v. Chicago etc. R. Co., 37 Iowa, 264; s. c. 43 Iowa, 276. pp. 43, 235, 270, 548, 562.

Allerton Packing Co. v. Egan, 86 Ill. 253; s. c. 18 Alb. L. J. 295. p. 222.

Alling v. Boston etc. R. Co., 7 Reporter, 622. p. 511.

Allyn v. Boston etc. R. Co., 105 Mass. 77. p. 551.

c 21 Minn. 297; 67 Me. 104; 41 Iowa, 231; 12 Bush, 47; 105 Mass. 207; 116 Mass. 541; 1 Bradw. 422.

- Alton v. Midland R. Co., 19 C. B. (N. s.) 213; s. c. 11 Jur. (N. s.) 672; 34 L. J. (C. P.) 292; 13 Week. Rep. 918. p. 546.
 c 44 L. T. (N. s.) 152; L. R. 10 C. P. 194.
- American Contract Corp. v. Cross, 8 Bush, 472. pp. 510, 512.
- American Steamship Co. v. Bryan, 83 Pa. St. 446. pp. 472, 517, 518, 519.
- Ames v. Union R. Co., 117 Mass. 541. pp. 544, 546.
- Anderson v. North-Eastern R. Co., 4 L. T. (N. s.) 216. p. 536.
- Anderson v. Ross, 2 Sawyer, 91. p. 463.
- Anderson v. Toledo etc. R. Co., 32 Iowa, 86. p. 537.
- Anonymous, 1 Dyer, 33 a, pl. 10. p. 56.
- Ansell v. Waterhouse, 2 Chitty, 1; s. c. 6 Mau. & Sel. 385; 18 Eng. Ch. 227. pp. 121, 132, 133, 493, 542, 544, 545.
 c 4 Watts & S. 180; 15 Mich. 131; 19 C. B. (N. s.) 238; 8 Best & S. 331, 383; L. R. 2 Q. B. 421, 423; 36 L. J. (Q. B.) 186; 8 N. Y. 458; 19 Wend. 281; 10 Upper Canada Q. B. 463; 9 Metc. 13; 19 Wend. 239.
- Armstrong v. Lancashire etc. R. Co., 33 L. T. (N. s.) 228; s. c. L. R. 10 Exch. 47; 44 L. J. (Exch.) 89; 23 Week. Rep. 295. p. 287.
- Armstrong v. New York etc. R. Co., 66 Barb. 437. pp. 234, 269.
- Arnold v. Illinois etc. R. Co., 83 Ill. 273. pp. 29, 402.
 c 2 Bradw. 109.
- Ashby v. White, 1 Smith's Ld. Cas. 450. p. 285.
- Ashmore v. Pennsylvania etc. Transp. Co., 28 N. J. L. 180. p. 386.
- Aston v. Heaven, 2 Esp. 533. pp. 114, 118, 130, 134, 155, 185, 199, 236, 237, 238, 355, 405, 452.
 c 2 Duv. 553; 3 Cliff. 419; 21 Md. 296; 8 Best & S. 379, 384; L. R. 4 Q. B. 388, 419, 424; 36 L. J. (Q. B.) 185, 187; 48 N. H. 212; 13 Pet. 191; 4 Iowa, 550; 19 Ill. 517; 1 Duer, 241; 1 McCord, 447; 13 Vt. 326, 327; 11 Gratt. 711; 13 Conn. 326; 9 Metc. 7; 23 N. H. 284.
- Atchison v. King, 9 Kan. 550. p. 220.
- Atchison etc. R. Co. v. Brewer, 20 Kan. 669. p. 514.
- Atlantic etc. R. Co. v. Dunn, 19 Ohio St. 162. pp. 369, 575.
 c 38 Ind. 127; 11 Nev. 364; 3 So. Car. 598.
- Atwood v. Reliance Transp. Co., 9 Watts, 87. pp. 525, 526.
- Augusta etc. R. Co. v. Renz, 55 Ga. 126. pp. 261, 444.
- Aurora v. Pulfer, 56 Ill. 270. p. 220.
 c 64 Ill. 23; 81 Ill. 303.
- Aurora Branch R. Co. v. Grimes, 13 Ill. 585. p. 552.
- Austin v. Great Western R. Co., L. R. 2 Q. B. 442; 8 Best & S. 327; 36 L. J. (Q. B.) 201; 15 Week. Rep. 863; 16 L. T. (N. s.) 320. p. 44.
 c 34 Upper Canada Q. B. 459.
- Austin v. Manchester etc. R. Co., 10 C. B. 454. p. 528.
- Austin v. New Jersey Steamboat Co., 43 N. Y. 75. p. 220.
- Aveson v. Kennaird, 6 East, 188. p. 557.
- Avey v. Atchison etc. R. Co., 11 Kan. 448. p. 549.
- Aycrigg's Executors v. New York etc. R. Co., 30 N. J. L. 462. p. 363.
- Ayles v. South-Eastern R. Co., 37 L. J. (Exch.) 104; s. c. L. R. 3 Exch. 146. p. 416.

B.

- Bacon v. Charlton, 7 Cush. 581. p. 557.
- Baker v. Brinson, 9 Rich. L. 201. p. 393.
- Baker v. Portland, 58 Me. 199. p. 330.
- Baldwin v. Collins, 9 Rob. (La.) 468. pp. 529, 530.
- Baldwin v. Greenwoods Turnpike Co., 40 Conn. 238. p. 220.
 c 43 Conn. 155; 13 Hun, 86.
- Ballou v. Farnham, 11 Allen, 73. p. 551.
- Baltimore v. Marriott, 9 Md. 160. p. 552.
- Baltimore etc. R. Co. v. Blocher, 27 Md. 277. pp. 317, 336, 362, 369, 375, 565, 576.
 c 3 Cliff. 428; 36 Wis. 464; 106 Mass. 189; 11 Nev. 364; 9 Hun, 673; 57 Me. 217, 226, 261; 36 Wis. 675.
- Baltimore etc. R. Co. v. Boteler, 38 Md. 586. p. 271.
 c 11 W. Va. 35.

- Baltimore etc. R. Co. v. Brady, 32 Md. 335. p. 386.
- Baltimore etc. R. Co. v. Gallahue, 12 Gratt. 655. p. 543.
- Baltimore etc. R. Co. v. Smith, 23 Md. 402. p. 513.
- Baltimore etc. R. Co. v. The State, 30 Md. 47. p. 293.
 c 43 Md. 551; 39 Md. 452.
- Baltimore etc. R. Co. v. Wilkinson, 30 Md. 224. pp. 261, 445, 547, 562.
- Baltimore etc. R. Co. v. Wightman's Administrator, 29 Gratt. 431. pp. 200, 211, 543, 549.
- Baltimore Steam-Packet Co. v. Smith, 23 Md. 402. pp. 436, 537, 539.
- Bancroft v. Boston etc. R. Co., 97 Mass. 270. pp. 233, 269.
- Bank of Orange v. Brown, 3 Wend. 158. pp. 542, 543, 544, 545.
 c 4 Watts & S. 180; 58 N. Y. 134; 12 Ill. 412; 37 N. Y. 242; 1 E. D. Smith, 97; 24 N. Y. 281.
- Bankier v. Wilson, 5 Lower Canada Rep. 203. p. 515.
- Barber v. Essex, 27 Vt. 62. p. 553.
- Barden v. Boston etc. R. Co., 121 Mass. 426; s. c. 16 Am. L. Reg. (N. S.) 664. p. 263.
- Barker v. Coffin, 31 Barb. 556. pp. 65, 70, 71, 376.
- Barker v. Midland R. Co., 18 C. B. 46; s. c., 25 L. J. (C. P.) 184. pp. 350, 351.
 c 59 Pa. St. 141.
- Barker v. New York etc. R. Co., 24 N. Y. 599. pp. 67, 376, 561.
- Barnes v. Ward, 2 Car & Kir. 661; s. c. 9 C. B. 392; 14 Jur. 334; 19 L. J. (C. P.) 195. p. 79.
 c 38 Md. 585; 68 N. Y. 290, 292; 3 Best & S. 254; 4 C. B. (N. S.) 561; 4 Hurl. & N. 70, 74; 5 Jur. (N. S.) 150; 28 L. J. (Exch.) 140; L. R. 1 C. P. 54, 55; 11 Jur. (N. S.) 980; 7 C. B. (N. S.) 742, 744, 745; 6 Jur. (N. S.) 898, 899; 29 L. J. (C. P.) 206, 207; 9 Allen, 562; 15 Abb. Pr. (N. S.) 323; 35 N. H. 278; 2 C. P. Div. 371; 48 Vt. 130; 15 C. B. (N. S.) 240; 33 L. J. (C. P.) 5; 29 Wis. 26; 10 Allen, 375; 33 N. J. L. 264; 50 Barb. 363; 12 C. B. (N. S.) 6; 5 Duer, 499; 2 Best & S. 779; 31 L. J. (Q. B.) 218; 5 Reporter, 345; 86 Pa. St. 80; 34 N. J. L. 471, 472; 4 Best & S. 157; 32 L. J. (Q. B.) 240.
- Barney v. Oyster Bay etc. Co., 67 N. Y. 301; s. c. 3 Abb. N. C. 525. pp. 351, 377.
- Barney v. Prentiss, 4 Har. & J. 317. p. 501.
- Barney v. The D. R. Martin, 11 Blatchf. 233; s. c. 5 Ch. Leg. N. 535. pp. 351, 377.
- Barr v. Midland R. Co., Irish Rep. 1 C. L. 130. p. 337.
- Barreda v. Silsbee, 21 How. 167. p. 509.
- Barron v. Illinois etc. R. Co., 1 Biss. 412. pp. 415, 550.
- Bartholomew v. St. Louis etc. R. Co., 53 Ill. 227. pp. 534, 535, 556.
- Barton v. St. Louis etc. R. Co., 52 Mo. 253. pp. 259, 563.
- Bass v. Chicago etc. R. Co., 36 Wis. 450; s. c. 39 Wis. 636; 42 Wis. 654; 2 N. W. Rep. 84. pp. 67, 224, 335, 345, 346, 376, 576. (In full, p. 311.)
 c 42 Wis. 667, 673; 36 Wis. 670, 671, 673, 675.
 d 36 Wis. 675.
- Batson v. Donovan, 4 Barn. & Ald. 21. p. 497.
- Bayley v. Manchester etc. R. Co., L. R. 7 C. P. 415; s. c. L. R. 8 C. P. (Exch.) 148; 41 L. J. (C. P.) 278; 28 L. T. (N. S.) 366; 42 L. J. (C. P.) 78. pp. 369, 374.
 c 36 Wis. 675.
- Bayliss v. Lintott, 28 L. T. (N. S.) 666; s. c. 42 L. J. (C. P.) 119; L. R. 8 C. P. 345. pp. 521, 538, 545.
- Beal v. South Devon R. Co., 3 Hurl. & Colt. 337. pp. 398, 574.
- Beall v. King, 12 East, 452. p. 542.
- Bean v. Green, 12 Me. 422. pp. 524, 527.
 c 12 Wall. 86; 46 N. H. 229; 54 Pa. St. 251; 1 Woods, 577.
- Beard v. Connecticut etc. R. Co., 48 Vt. 401. p. 108.
- Beardsley v. Swan, 4 McLean, 333. p. 553.
- Beatty v. Gilmore, 16 Pa. St. 483. p. 552.
- Becher v. Great Eastern R. Co., 22 L. T. (N. S.) 299; s. c. 18 Week. Rep. 627;

- L. R. 5 Q. B. 241; 39 L. J. (Q. B.) 122. pp. 512, 522.
- Beck v. East River Ferry Co., 6 Robt. 87. p. 294.
- Beckman v. Shouse, 5 Rawle, 79. p. 511.
- Beebe v. Ayres, 28 Barb. 275. pp. 70, 377.
- e 31 N. J. L. 393; 6 Reporter, 490; 47 Iowa, 86; 10 Ch. Leg. N. 78; 5 Daly, 51; 13 Hun, 362; 7 Hun, 673; 46 N. H. 221, 222.
- Beers v. Housatonic R. Co., 19 Conn. 566. pp. 217, 552, 563.
- e 13 Ill. 588; 45 Md. 492; 3 Daly, 385; 10 Iowa, 271; 24 N. J. L. 831; 19 Conn. 511; 26 Conn. 597; 17 Mich. 122; 29 Conn. 209; 36 Md. 377; 1 Iowa, 110; 19 Illow. Pr. 224; 24 N. J. L. 271, 277; 101 Mass. 465; 21 Iowa, 106; 8 Minn. 161; 45 Ala. 441; 23 Conn. 443, 444; 35 N. H. 277; 29 Md. 440; 24 Vt. 496; 31 Miss. 193, 197, 198; 15 Ind. 489; 23 Conn. 347; 18 Cal. 356; 37 Mo. 294; 61 Mo. 591; 9 Wis. 217; 5 Kan. 182; 40 Miss. 386; 52 Mo. 258; 33 Iowa, 568; 29 Md. 294; 37 Mo. 550; 9 Rich. L. 92; 17 Ill. 413; 34 N. Y. 14. ? 30 Pa. St. 464.
- Beisiegel v. New York etc. R. Co., 14 Abb. Pr. (N. s.) 29. p. 553.
- e 33 Ind. 362; 34 Iowa, 153, 161; 22 Minn. 172; 63 Ill. 179; 3 Keyes, 479; 1 Abb. App. Dec. 438; 70 N. Y. 125; 34 Iowa, 279; 32 Wis. 275; 49 Cal. 257; 45 N. Y. 664; 39 Illow. Pr. 414, 515; 7 Lans. 14; 42 N. Y. 473; 3 Lans. 85; 44 Ind. 82; 25 Mich. 291; 64 N. Y. 532; 6 Hun, 319; 63 N. Y. 525, 530; 2 Hun, 538; 5 N. Y. S. C. (T. & C.) 125; 38 N. Y. 449; 36 N. J. L. 536, 537; 2 N. Y. S. C. (T. & C.) 646; 45 N. Y. 850; 6 Jones & Sp. 135; 50 Ind. 45; 58 N. Y. 458, 459; 40 Barb. 208; 39 N. Y. 362, 363; 7 Hun, 534; 72 N. Y. 30, 69; 6 Daly, 496; 71 N. Y. 231; 59 N. Y. 472; 36 N. Y. 43.
- Belfast etc. R. Co. v. Keys, 9 H. L. Cas. 556; s. c. 8 Jur. (N. s.) 367; 9 Week. Rep. 793; 4 L. T. (N. s.) 841. pp. 511, 522.
- e L. R. 6 Q. B. 621; 40 L. J. (Q. B.) 304; 73 Ill. 355; L. R. 2 Q. B. 444; 8 Best & S. 332; 6 Hun, 547, 549; L. R. 1 Q. B. 534.
- Bell v. Drew, 4 E. D. Smith, 59. pp. 511, 512, 539.
- Bellefontaine etc. R. Co. v. Hunter, 33 Ind. 335. p. 558.
- e 22 Minn. 172; 21 Minn. 297; 64 Mo. 490; 41 Iowa, 231; 9 Kan. 631; 25 Mich. 291; 50 Ind. 45, 68, 82; 1 Wils. (Indianapolis) 82, 489; 47 Iowa, 551.
- Bellefontaine etc. R. Co. v. Snyder, 24 Ohio St. 670. pp. 284, 293.
- Beman v. Rufford, 1 Sim. 550; s. c. 15 Jur. 914; 20 L. J. (Ch.) 537; 6 Eng. Law & Eq. 106. p. 418.
- Benett v. Peninsular etc. Steamboat Co., 6 Dow. & L. 387; s. c. 6 C. B. 774; 13 Jur. 347; 18 L. J. (C. P.) 85. pp. 26, 55, 127, 155, 463, 464. (In full, p. 448.)
- e 15 Upper Canada C. P. 440. ? L. R. 4 Q. B. 388.
- Bennett v. Dutton, 10 N. H. 481. pp. 19, 26, 28, 65, 411. (In full, p. 2.)
- e 15 Mich. 131, 132; 4 Wall. 615.
- Bennett v. Holmes, 32 Ind. 108. p. 558.
- Bennett v. New Jersey etc. R. Co., 36 N. J. L. 225. p. 289. (In full, p. 281.)
- e 43 Wis. 527; 6 Cent. L. J. 430; 120 Mass. 492.
- Bennett v. New York etc. R. Co., 69 N. Y. 594; s. c. 5 Hun, 599; 4 Abb. N. C. 523. pp. 339, 376.
- e 37 Mich. 346.
- Bennett v. Railroad Co., 7 Phila. 11. pp. 69, 336, 549.
- Benson v. New Jersey etc. Transp. Co., 9 Bosw. 412. p. 570.
- Bentham v. Hoyle, 3 Q. B. Div. 289. p. 337.
- e 3 C. P. Div. 436.
- Bergheim v. Great Eastern R. Co., 3 C. P. Div. 221; s. c. 17 Am. L. Reg. (N. s.) 790; 6 Cent. L. J. 222; 18 Alb. L. J. 32. p. 516.
- e 19 Alb. L. J. 114.
- Bernhardt v. Rensselaer R. Co., 32 Barb. 165; s. c. 18 How. Pr. 427; 23 How. Pr. 166; 1 Abb. App. Dec. 131. p. 562.
- e 33 Iowa, 568; 3 Daly, 385; 49 Barb. 534; 32 How. Pr. 267; 35 N. Y. 39; 46 Barb. 269; 58 N. Y. 455; 33 Barb. 503; 24 N. Y. 445; 60 N. Y. 331.
- Berringer v. Great Eastern R. Co., 4 C. P. Div. 163. p. 435.
- Berry v. Cooper, 28 Ga. 543. p. 389.
- Bigelow v. Reed, 51 Me. 325. p. 220.
- e 58 Me. 206; 65 Me. 462, 550; 12 West. Jur. 478; 9 Wis. 26; 6 Daly, 215; 68 Me. 558; 13 Hun, 85; 55 N. Y. 119.

- Bigelow v. Rutland, 4 Cush. 247. p. 551.
 c 42 Me. 335; 22 Wis. 679, 680; 35 Me. 104; 35 N. H. 276; 3 Allen, 179; 42 N. H. 216; 17 How. 167.
- Bigge v. Parkinson, 7 Hurl. & N. 955; s. c. 31 L. J. (Exch.) 601. p. 153.
- Biles v. Holmes, 11 Ired. L. 16. p. 562.
- Bingham v. Rogers, 6 Watts & S. 495. pp. 525, 526, 538.
- Bird v. Great Northern R. Co., 28 L. J. (Exch.) 3. pp. 137, 206, 207, 212.
 c 8 Best & S. 389; 36 L. J. (Q. B.) 189.
- Birkett v. Whitehaven etc. R. Co., 4 Hurl. & N. 730; 28 L. J. (Exch.) 348. pp. 206, 412, 417.
- Birmingham v. Dorer, 3 Brewst. 69. p. 293.
- Bissell v. Michigan etc. R. Co., 22 N. Y. 258. p. 433.
 c 36 Barb. 425, 428; 12 Wall. 85; 24 N. Y. 271, 279.
- Bissell v. New York etc. R. Co., 23 N. Y. 61; s. c. 25 N. Y. 442; 26 N. Y. 630; 29 Barb. 602. pp. 385, 388, 400, 401, 402.
 c 17 How. 366, 370; 51 Pa. St. 327; 43 N. Y. 267; 2 Abb. Pr. 224; 31 N. J. L. 393; 51 N. Y. 63, 64; 42 N. Y. 214; 37 Ill. 507; 20 Minn. 130; 39 Iowa, 254; 51 Barb. 78. d 66 N. Y. 317. o 47 Ind. 485; 51 Pa. St. 323; 19 Ohio St. 14; 17 Wis. 376.
- Bixby v. Montpelier etc. R. Co., 49 Vt. 123. pp. 27, 560, 561.
- Black v. Carrollton R. Co., 10 La. An. 33. pp. 564, 572.
 c 49 N. H. 375.
- Blair v. Erie R. Co., 66 N. Y. 313; s. c. 3 Abb. N. C. 525. pp. 45, 520.
- Blair v. Milwaukee etc. R. Co., 20 Wis. 254. p. 222.
 c 16 Kan. 576, 577; 23 Wis. 193.
- Blake v. Midland R. Co., 18 Q. B. 93; s. c. 16 Jur. 562; 21 L. J. (Q. B.) 233; 10 Eng. Law & Eq. 439. p. 571.
 c 10 La. An. 42; 30 Barb. 110; 23 Pa. St. 529; 33 Pa. St. 328; 48 N. H. 545; 8 Am. L. Reg. 36; 26 Ill. 403; 3 Hurl. & N. 214; 32 Barb. 29, 31; 34 N. J. L. 157; 24 Md. 105; 30 N. J. L. 200; 1 Handy, 489, 490; 26 Ill. 403; L. R. 3 Adm. 480; Irish Rep. 6 C. L. 254; 6 Nev. 231.
- Block v. Bannerman, 10 La. An. 1. pp. 361, 364.
 c 3 Cliff. 427; 27 La. An. 5.
- Block v. Steamboat Trent, 18 La. An. 664. p. 524.
 c 20 La. An. 403; 27 La. An. 92.
- Blossman v. Dodd, 43 N. Y. 264. p. 527.
 c 10 Jones & Sp. 363, 364; 48 N. Y. 216; 57 N. Y. 5; 64 Barb. 391; 54 N. Y. 515; 14 Blatchf. 14; 42 N. Y. S. C. (T. & C.) 363.
- Blossman v. Hooper, 16 La. An. 160 pp. 521, 536.
- Blum v. Southern Pullman Palace-Car Co., 3 Cent. L. J. 591. pp. 531, 532
- Blumantle v. Fitchburg R. Co., 20 Alb. L. J. 304. pp. 511, 523.
- Boice v. Hudson etc. R. Co., 61 Barb. 611. pp. 65, 70, 71, 376.
- Boland v. Missouri R. Co., 36 Mo. 484. p. 245.
- Bolch v. Smith, 7 Hurl. & N. 736; s. c. 8 Jur. (N. s.) 197; 31 L. J. (Exch.) 201; 10 Week. Rep. 387; 6 L. T. (N. s.) 158. pp. 82, 83.
 c 21 Minn. 210; 46 Md. 218, 222; 41 N. Y. 532, 534; 33 L. J. (C. P.) 3; 10 Allen, 375; 67 N. Y. 370; 2 C. P. Div. 310; 5 Cent. L. J. 281.
- Bomar v. Maxwell, 9 Humph. 621. pp. 511, 512, 521.
 c 15 Mich. 127; 30 N. Y. 612; 41 Miss. 678; 10 How. Pr. 333; 11 Humph. 420.
- Bonsteel v. Vanderbilt, 21 Barb. 26. pp. 466, 567.
- Bordeaux v. Erie R. Co., 8 Hun, 579. pp. 341, 342, 376.
- Boston etc. R. Co. v. Proctor, 1 Allen, 267. pp. 71, 367.
 c 67 Me. 165; 17 Alb. L. J. 367; 6 Cent. L. J. 382; 31 N. J. L. 393; 50 Ind. 144; 2 Cent. L. J. 830; 54 N. Y. 516; 46 N. H. 219; 14 Allen, 436.
- Bostwick v. Champion, 11 Wend. 581. pp. 410, 412, 418, 436.
 c 20 Pa. St. 503; 19 Wend. 254; 26 Ala. 736, 737; 49 N. Y. 26, 29.
- Boswell v. Hudson etc. R. Co., 10 Abb. Pr. 442. p. 401.
- Boswell v. Hudson River R. Co., 5 Bosw. 699. p. 402.
- Bosworth v. Swansey, 10 Metc. 363. p. 551.
 c 22 N. H. 564; 117 Mass. 65; 3 Allen, 408;

- 42 Me. 93; 47 N. Y. 33; 10 Allen, 21; 120 Mass. 492; 37 Barb. 299; 36 N. Y. 53; 39 Me. 197, 198; 119 Mass. 278; 7 Gray, 459. • 29 Wis. 24.
- Boucher v. Lawson, Hardw.* 194. p. 452.
- Boulston v. Sandiford, Skin.* 279. p. 493.
- Boutiller v. Milwaukee,* 8 Minn. 97. p. 544.
- Bowen v. New York etc. R. Co.,* 18 N. Y. 408. pp. 201, 211.
• 24 N. Y. 445; 71 N. Y. 494; 68 N. Y. 310; 5 Hun, 526; 32 Barb. 659; 34 N. Y. 11, 408, 412; 63 Barb. 266.
- Boyce v. Anderson,* 2 Pet. 150. pp. 52, 114, 122, 186, 199, 356, 411.
• 15 Mich. 140; 4 Iowa, 549; 13 Pet. 192; 26 Ill. 387; 13 Vt. 326; 7 Hill, 545, 550; 14 N. Y. 578; 9 Metc. 13; 11 Gratt. 710; 49 Me. 281; 13 Conn. 326. • 3 Cliff. 421; 13 Cal. 603.
- Boyce v. Bayliffe,* 1 Camp. 58. p. 470.
- Boyce v. California Stage Co.,* 25 Cal. 460. pp. 554, 585.
• 2 Mont. 524, 525; 44 Cal. 84.
- Brackett v. The Hercules, Gilp.* 184. p. 467.
- Bradburn v. Great Western R. Co.,* 44 L. J. (Exch.) 9; s. c. L. R. 10 Exch. 1. p. 572.
• 29 Gratt. 446.
- Bradley v. Northern Transp. Co.,* 15 Ohio St. 553. p. 481.
- Brand v. Troy,* 8 Barb. 368. pp. 365, 446.
• 24 Md. 121; 25 Md. 387; 18 N. Y. 258; 1 E. D. Smith, 272; 6 Duer, 641; 20 Ohio, 447; 2 Hilt. 38; 8 Barb. 435; 40 Miss. 458; 43 Miss. 124, 125, 127; 24 Md. 103; 22 Barb. 583, 584; 13 Barb. 15, 496; 57 Me. 214; 18 N. Y. 258; 32 Barb. 659.
- Brasfield v. Lee,* 1 Ld. Raym. 329. p. 564.
- Brass v. Maitland,* 6 El. & Bl. 470; s. c. 26 L. J. (Q. B.) 49. p. 145.
• 2 Abb. C. C. 222; 1 Sawyer, 448; 15 Wall. 535; 7 Lans. 213; 107 Mass. 576; 64 Barb. 213; 11 C. B. (N. s.) 562, 563; 2 Cliff. 27; 2 Sprague, 36.
- Brazier v. Polytechnic Inst.,* 1 Fost. & Fin. 712. p. 153.
- Breen v. Texas etc. R. Co.,* 50 Texas, 43. p. 70.
- Brehm v. Great Western R. Co.,* 34 Barb. 256. pp. 211, 220, 221, 559, 562, 563.
• 2 Col. 457, 459; 2 Mont. 526.
- Brehme v. Adams Express Co.,* 25 Md. 328. p. 386.
- Bremner v. Williams,* 1 Car. & P. 414. pp. 115, 117, 119, 126, 127, 130, 138, 145, 155, 198, 236, 453.
• 48 N. H. 313; 8 Best & S. 379, 391, 401; L. R. 2 Q. B. 419, 429, 437; 36 L. J. (Q. B.) 185, 190; 11 Gratt. 715. • 9 Metc. 7, 10. • L. R. 4 Q. B. 388.
- Brennan v. Fair Haven etc. R. Co.,* 45 Conn. 284. p. 445.
- Bretherton v. Wood,* 3 Brod. & B. 54; s. c. 9 Price, 408. pp. 26, 28, 116, 121, 132, 542, 544, 545.
- Bridge v. Grand Junction etc. R. Co.,* 3 Mee. & W. 244. pp. 251, 275, 276, 277, 278, 279, 280, 284.
• 6 Cent. L. J. 46; 16 Pa. St. 466; 19 Conn. 575; 31 Barb. 388; 18 N. Y. 252; 17 Barb. 97; 10 Ch. Leg. N. 121; 10 Mee. & W. 548, 549; 6 Jur. 955; 12 L. J. (Exch.) 11; 20 Ill. 493; 3 C. B. 15; 10 Jur. 884; 15 L. J. (C. P.) 304; 25 Vt. 123; 5 Duer, 26; 25 Me. 48; 13 Ga. 88; 26 Ga. 270; 24 N. J. L. 270, 283; 101 Mass. 465; 37 Cal. 423; 19 Pa. St. 301; 29 Md. 437; 15 Ind. 489; 12 Metc. 418; 95 U. S. 442; 2 C. P. Div. 373; 47 Pa. St. 304; 22 Vt. 222, 223; 6 Iowa, 452; 61 Mo. 590; 52 N. H. 554; 9 Wis. 218, 219; 47 Miss. 222; 2 Col. 154, 159; 12 C. B. (N. s.) 9; 2 Denio, 439; 8 C. B. 130, 131; 15 Q. B. 283; 5 El. & Bl. 201; 38 Ala. 85, 88; 46 Pa. St. 159; 6 Gray, 72; 13 Barb. 497; 6 Ohio St. 109; 4 Am. L. Reg. (N. s.) 17; 9 La. An. 442; 6 Cent. L. J. 46; 18 N. Y. 252; 20 Wis. 535; 29 Vt. 428; L. R. 10 Exch. 53; 44 L. J. (Exch.) 93. • 43 Wis. 526; 6 Cent. L. J. 430; 16 N. Y. 343.
- Bridges v. North London R. Co.,* 40 L. J. (Q. B.) 188; s. c. L. R. 6 Q. B. 377; 19 Week. Rep. 824; 24 L. T. (N. s.) 835; 43 L. J. (Q. B.) 151; L. R. 7 H. L. 213; 23 Week. Rep. 62; 30 L. T. (N. s.) 844; 43 L. J. (Q. B.) 151; L. R. 7 Q. B. 213; 23 Week. Rep. 62; 30 L. T. (N. s.) 844 (reversing judgment of Exchequer Chamber); 40 L. J. (Q. B.) 188. pp. 230, 231, 268, 272, 563.
• 2 McArthur, 50; 28 Mich. 453; 2 Q. B. Div. 87, 89; 2 Exch. Div. 251, 252; L. R. 9 C. P. 134; 43 L. J. (C. P.) 139; L. R. 8 Q. B. 168, 169, 178, 181, 182; 42 L. J. (Q. B.) 109; Irish Rep. 3 C. L. 245; 36 Upper Canada Q. B. 371; 37 Upper

- Canada Q. B. 467. d 3 App. Cas. 199, 200, 201, 202, 208; L. R. 7 C. P. 327; 41 L. J. (C. P.) 143.
- Brien v. Bennett, 8 Car. & P. 724. p. 42.
- Briggs v. Grand Trunk R. Co., 24 Upper Canada Q. B. 510. pp. 70, 71, 376, 377.
- Briggs v. Taylor, 28 Vt. 180. p. 357.
e 3 Cliff. 422; 48 N. H. 313; 20 Minn. 133.
- Briggs v. Vanderbilt, 19 Barb. 222. pp. 466, 555, 567.
? 28 N. Y. 224.
- Brock v. Gale, 14 Fla. 523. pp. 484, 510, 537.
- Brockway v. Lascala, 1 Edm. Sel. Cas. 135. p. 472.
- Brooke v. Grand Trunk R. Co., 15 Mich. 332. p. 424.
- Brooke v. Pickwick, 4 Bing. 218; s. c. 12 J. B. Moo. 447; 13 Eng. Com. Law, 404. pp. 451, 491, 494, 498, 512, 523, 527.
e 23 Md. 410; 12 Ga. 224; 19 Wend. 236, 237, 241, 269; 10 How. Pr. 332; 9 Lower Canada Rep. 180; 44 N. H. 330; 7 Am. L. Reg. (N. S.) 537; 6 Blatchf. 69; 46 N. H. 227; 6 Cush. 72; 29 Ind. 364; 6 Hun, 547; 16 Pa. St. 78.
- Brown v. Camden etc. R. Co., 83 Pa. St. 316. p. 528.
- Brown v. Eastern R. Co., 11 Cush. 97. p. 528.
e 12 Gray, 392; 43 N. Y. 268; 12 Wall. 85; 21 Gratt. 673; 64 Barb. 391; 46 N. H. 219; 14 Allen, 437; 49 Barb. 21.
- Brown v. Edgington, 2 Man. & G. 279. pp. 127, 129, 137, 142, 144.
- Brown v. Great Eastern R. Co., 2 Q. B. Div. 406. p. 337.
e 3 C. P. Div. 434.
- Brown v. Hannibal etc. R. Co., 64 Mo. 430; s. c. 66 Mo. 588. pp. 369, 375, 557, 572.
e 66 Mo. 595.
- Brown v. Harris, 2 Gray, 359. p. 467.
- Brown v. Mallett, 5 C. B. 599. p. 455.
- Brown v. Missouri etc. R. Co., 64 Mo. 536. pp. 44, 376, 401.
- Brown v. New York etc. R. Co., 32 N. Y. 597; s. c. 34 N. Y. 404; 31 Barb. 335. pp. 201, 222, 290, 294.
e 46 Pa. St. 161; 4 Am. L. Reg. (N. S.) 14; 36 N. Y. 381; 63 Barb. 266; 3 Robt. 515; 34 Iowa, 158; 28 Wis. 495; 35 N. Y. 37, 44, 45; 34 N. Y. 29; 39 N. Y. 361; 6 Robt. 87; 38 N. Y. 262. ? 66 N. Y. 14; 65 Barb. 151, 152, 155; 46 Barb. 270.
- Brown v. The D. S. Cage, 1 Woods, 403. p. 481.
- Bryant v. Rich, 104 Mass. 156; s. c. 106 Mass. 180. pp. 366, 369, 581.
e 36 Wis. 675; 62 Me. 88; 44 Iowa, 318.
- Buel v. New York etc. R. Co., 31 N. Y. 314. pp. 261, 267.
- Buffett v. Troy etc. R. Co., 36 Barb. 420; s. c. 40 N. Y. 168. p. 433.
- Burges v. Wickham, 3 Best & S. 669; s. c. 33 L. J. (Q. B.) 17. p. 148.
- Burgess v. Clements, 4 Mau. & Sel. 305. p. 515.
- Burgess v. Great Western R. Co., 6 C. B. (N. S.) 923. pp. 101, 107, 269.
e 56 Me. 242; 26 Iowa, 145.
- Burke v. Broadway etc. R. Co., 34 How. Pr. 239. p. 553.
- Burke v. South-Eastern R. Co., 5 C. P. Div. 1; s. c. 28 Week. Rep. 306; 20 Alb. L. J. 498. p. 437.
- Burnell v. New York etc. R. Co., 45 N. Y. 184. pp. 432, 534, 535, 539.
e 57 N. Y. 555, 557, 558; 37 N. Y. Superior Ct. 532.
- Burnham v. Grand Trunk R. Co., 63 Me. 298. p. 70.
- Burns v. Bellefontaine etc. R. Co., 50 Mo. 139. pp. 261, 444. (In full, p. 438.)
- Burns v. Cork etc. R. Co., 13 Irish Rep. C. L. (N. S.) 543. pp. 135, 147, 157, 199, 221, 554.
e L. R. 4 C. B. 391; 8 Best & S. 385, 403; L. R. 2 Q. B. 425, 440; 36 L. J. (Q. B.) 188, 195; L. R. 5 Q. B. 195, 512.
- Burns v. Elba, 32 Wis. 605. p. 271.
- Burrows v. Erie etc. R. Co., 63 N. Y. 556. pp. 227, 228, 267.
- Bush v. Johnson, 23 Pa. St. 209. p. 552.
- Butcher v. London etc. R. Co., 16 C. B. 13; s. c. 1 Jur. (N. S.) 427; 24 L. J. (C. P.) 137; 3 Am. L. Reg. 694; 29 Eng. Law & Eq. 347. pp. 511, 518, 532.
e 2 Jur. (N. S.) 141; 19 Wis. 42; 41 Ala. 504; 35 Vt. 620; 3 C. P. Div. 226, 227; 18 Alb. L. J. 33; L. R. 6 C. P. 50, 51; 40 L. J. (C. P.) 12.
- d 28 Upper Canada Q. B. 380.

Butterfield v. Forrester, 11 East, 60; s. c. 2 Thompson on Neg. 1104. pp. 251, 275, 276, 277, 278, 551.

c 68 Me. 557; 2 C. B. (N. S.) 739; 105 Mass. 207; 4 Ind. 100; 6 Gill, 205; 10 Mich. 198; 4 Mo. App. 489; 2 Bradw. 39; 31 Miss. 193; 47 Miss. 419; 2 Col. 158, 159; 12 C. B. (N. S.) 9; 3 Mee. & W. 248; 3 Fla. 26; 24 N. J. L. 832; 7 Taun. 514; 38 Ala. 85; 18 Cal. 356; 22 Vt. 21, 22, 25; 6 Iowa, 452; 2 Pick. 624; 61 Mo. 591; 52 N. H. 554; 9 Wis. 217; 25 Ind. 197; 24 Vt. 496; 22 N. J. L. 189; 21 Pick. 147; 13 Ill. 587; 6 Cent. L. J. 46; 45 Md. 91; 41 N. H. 50; 2 Woodb. & M. 345; 4 Per. & Dav. 676; 1 Q. B. 36; 5 Jur. 798; 12 Mete. 418; 9 Pa. St. 194; 16 Pa. St. 465, 466, 468; 19 Conn. 572; 33 Ind. 356, 363, 367; 20 N. Y. 69; 3 Ohio St. 189, 190; 29 Md. 437; 2 Cush. 604, 605; 32 Barb. 167; 15 Conn. 131; 18 N. Y. 251; 5 El. & Bl. 855; 2 Jur. (N. S.) 117; 17 Barb. 97; 5 Duer, 25; 24 N. J. L. 269, 270, 283; 35 Ind. 466; 10 Ch. Leg. N. 121; 33 Barb. 416; 63 Mo. 420; 30 Ala. 329; 26 Conn. 597, 601; 10 Mee. & W. 549; 12 Pick. 177; 26 Me. 240; 11 Wis. 169, 170, 171; 63 N. C. 349; 6 Jur. 955; 12 L. J. (Exch.) 11; 23 Wend. 452; 61 Barb. 456; 2 N. H. 363; 2 McMull. 408; 25 Me. 49; 18 Ga. 686; 13 Ga. 88; 26 Ga. 270; 4 Jur. 320; 29 Conn. 209; 20 Ill. 488, 491, 493; 53 Ala. 79; 67 Me. 104; 6 Cow. 191; 3 C. B. 9; 8 Gray, 132; 27 Conn. 412; 95 U. S. 442; 20 Wis. 535; 6 Cent. L. J. 46; 26 Ill. 376; 18 N. Y. 251; 7 Wis. 431; 41 N. H. 50; 37 Mo. 456; 7 Bosw. 135; 104 Mass. 142; 37 Mo. 553.

Button v. Hudson River R. Co., 18 N. Y. 248. p. 553.

c 7 Bosw. 135; 32 Barb. 169; 4 Daly, 331; 19 How. Pr. 203; 49 Barb. 531; 33 Barb. 416; 16 Abb. Pr. 349; 34 Cal. 164; 50 How. Pr. 128; 1 Keyes, 572; 33 How. Pr. 199; 2 Abb. App. Dec. 331; 20 N. Y. 71; 5 Hun, 480; 25 Mich. 282; 42 N. Y. 361; 11 Wis. 171; 35 Ind. 466; 13 Ind. 89; 38 Vt. 51; 15 Wall. 407; 65 Barb. 152; 4 Jones & Sp. 448; 25 Ind. 197; 40 Barb. 209, 210; 6 Robt. 92, 93; 38 Ala. 85, 87.

Buxton v. North-Eastern R. Co., L. R. 3 Q. B. 549; s. c. 37 L. J. (Q. B.) 549. pp. 412, 413, 415, 432.

c Irish Rep. 6 C. L. 124; 40 L. J. (Q. B.) 94; L. R. 6 Q. B. 273; L. R. 5 C. P. 441, 444.

Buzzell v. Laconia Man. Co., 48 Me. 113. p. 552.

c 71 Ill. 420; 50 Mo. 305; 3 Dill. 325; 14 Minn. 363; 13 Allen, 442; 39 Iowa, 621; 66 Me. 425; 42 Ala. 714. o 48 Cal. 426.

Byrne v. Wilson, Irish Rep. 15 C. L. 332. pp. 220, 290.

c 50 N. H. 146; 39 N. J. L. 309, 310; L. R. 3 Adm. 476.

C.

Cadwallader v. Grand Trunk R. Co., 9 Lower Canada Rep. 169. pp. 511, 512, 513, 538.

Cahill v. London etc. R. Co., 10 C. B. (N. S.) 154; s. c. 7 Jur. (N. S.) 1164; 30 L. J. (C. P.) 289; 9 Week. Rep. 653; 4 L. T. (N. S.) 246 (affirmed on appeal, 13 C. B. (N. S.) 818; 8 Jur. (N. S.) 1063; 31 L. J. (C. P.) 271; 10 Week. Rep. 391; 3 Am. L. Reg. 441). pp. 511, 522, 523.

c 36 Upper Canada Q. B. 355, 356; L. R. 6 Q. B. 619, 621; 40 L. J. (Q. B.) 303, 304; 73 Ill. 353, 354, 356; 8 Best & S. 333; 6 Hun, 547; 56 Me. 62; 8 Am. L. Reg. (N. S.) 399; 98 Mass. 378.

Caldwell v. Murphy, 1 Duer, 233; s. c. 11 N. Y. 419. pp. 208, 557, 564, 571.

c 6 Duer, 532; 44 Ind. 201; 19 Ill. 577; 5 Hun, 529; 32 Barb. 659; 48 N. H. 315, 545; 11 N. Y. 416; 24 N. Y. 193; 49 Me. 281; 1 Hilt. 283.

Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282. pp. 199, 205, 211, 212, 216, 221, 222, 233, 480, 574, 575.

c 58 N. Y. 139, 141; 3 Jones & Sp. 130.

Callahan v. Bean, 9 Allen, 401. p. 551.

c 58 Me. 388; 17 Mich. 120; 98 Mass. 569; 104 Mass. 62; 14 Allen, 431.

Calyc's Case, 8 Co. 63. pp. 33, 491, 516.

Camden etc. R. Co. v. Baldauf, 16 Pa. St. 67. pp. 386, 522, 523, 539.

Camden etc. R. Co. v. Burke, 13 Wend. 611. pp. 7, 114, 121, 236, 238, 491, 521, 526.

c 15 Mich. 140; 30 N. Y. 615; 3 Park. Cr. Cas. 237; 21 Md. 297; 23 Md. 410; 44 Ind. 201; 4 Iowa, 550; 29 Vt. 427; 24 N. Y. 218; 32 Barb. 659; 7 Rich. L. 163; 7 Mete. 601; 1 Am. Rail. Cas. 394; 3 E. D. Smith, 333; 48 N. H. 315; 24 N. Y. 193; 19 Wend. 236; 9 Mete. 13; 39 Iowa, 249; 5 Cent. L. J. 58.

Camden Transp. Co. v. Belknap, 21 Wend. 354. pp. 514, 526.

c 57 N. Y. 558; 11 N. Y. 490; 31 Conn. 283; 22 Iowa, 171; 13 Ill. 748; 29 Ind. 361; 7 Hill, 573; 1 Dakota, 360.

Campbell v. Caledonian R. Co., 14 Scot. Sess. Cas. (N. S.) 806. p. 530.

Campbell v. Perkins, 8 N. Y. 430. p. 418.

c 24 N. Y. 231.

- Canadian (The), 1 Brown's Adm. 11.
pp. 466, 568, 570.
- Candace (The), 1 Low. 126. p. 482.
- Candee v. Pennsylvania R. Co.*, 21 Wis.
582. pp. 432, 433, 435. (In full, p.
419.)
- Canning v. Williamstown, 1 Cush. 451.
p. 571.
c 63 Ill. 320; 20 Wis. 617; 24 Md. 107; 11
Allen, 79; 44 Iowa, 320, 321; 6 Nev. 232; 48 N.
H. 545.
- Cantling v. Hannibal etc. R. Co., 54
Mo. 385. p. 512.
- Carleton v. Franconia Iron Co., 99
Mass. 216. p. 226.
c 102 Mass. 502; 42 Ind. 343; 116 Mass. 68;
59 Me. 188; 56 Me. 506.
- Carlin v. Chicago etc. R. Co., 37 Iowa,
316. p. 552.
c 42 Iowa, 195, 681; 38 Iowa, 126, 297; 41
Iowa, 231; 48 Vt. 129.
- Carmany v. Mexican Gulf Co., 5 La.
An. 703. p. 548.
- Carpue v. London etc. R. Co., 5 Q. B.
747; s. c. Dav. & M. 608; 3 Eng. Rail.
Cas. 692; 8 Jur. 464; 13 L. J. (Q.
B.) 138. pp. 137, 191, 192, 196, 207,
211, 213.
c 38 Miss. 275; 21 Md. 291; 4 Iowa, 549; 8
Best & S. 389; L. R. 2 Q. B. 427; 36 L. J. (Q.
B.) 189; 18 N. Y. 538, 544; 9 Rich. L. 91; 3 E.
D. Smith, 333; 109 Mass. 406; 2 Post. & Fin.
733; 9 Jur. (N. s.) 341; 16 Barb. 117; 1 Moo.
P. C. C. 116. d Irish Rep. 6 C. L. 226; 11
Allen, 317.
- Carr v. Lancashire R. Co., 7 Exch. 707.
p. 390.
- Carroll v. New York etc. R. Co., 1
Duer, 571. pp. 260, 262, 333.
c 86 Pa. St. 145; 6 Duer, 415, 419; 34 N. Y.
11; 36 Mo. 435; 37 Mo. 548; 57 N. Y. 396; 58
Me. 196.
- Carroll v. Staten Island R. Co., 58 N.
Y. 126. pp. 197, 199, 205, 221, 223,
224, 480, 484.
- Carter v. Peck, 4 Sneed, 203. pp. 432,
433.
c 1 Cent. L. J. 542.
- Cary v. Cleveland etc. R. Co., 29 Barb.
35. pp. 432, 534, 536.
c 45 N. Y. 189; 36 Barb. 428; 7 Lans. 64; 50
Barb. 205; 24 N. Y. 278; 12 Wall. 85.
- Caswell v. Boston etc. R. Co., 98 Mass.
194. p. 110.
c 104 Mass. 141; 103 Mass. 514.
- Caterham v. London etc. R. Co., 87
Eng. Com. Law, 410. p. 98.
- Catley v. Winttingham, Peake, 150. p.
499.
- Catlin v. Hill. (See Thorogood v.
Bryan.)
c 46 Pa. St. 159; 4 Am. L. Reg. (N. s.) 17.
- Caton v. Burton, Cowp. 330. p. 460.
- Cayzer v. Taylor, 10 Gray, 274. p. 222.
c 102 Mass. 584; 46 Mo. 169; 13 Allen, 238;
10 Allen, 233; 55 Ind. 49; 12 Minn. 372; 56 Ind.
513; 66 Me. 425; 8 Allen, 446; 58 N. Y. 59; 110
Mass. 25.
- Central R. Co. v. Green, 86 Pa. St. 421;
s. c. 5 Week. Jur. 297; 6 Cent. L. J.
381. pp. 349, 350.
- Central R. Co. v. Van Horn, 38 N. J. L.
133. pp. 227, 231, 268, 548.
- Chaffee v. Boston etc. R. Co., 104 Mass.
108. p. 270.
- Chamberlain v. Chandler*, 3 Mason, 242.
pp. 314, 316, 361, 365, 463, 469, 470.
(In full, p. 459.)
c 1 Cliff. 149; 3 Cliff. 427; 36 Wis. 460; 106
Mass. 189; 31 How. Pr. 278; 1 Sprague, 186;
36 Wis. 672; 27 La. An. 5, 12; 6 Ben. 371; 3
Sawyer, 313; 57 Me. 217; Chase's Dec. 152.
d 3 McAll. 105.
- Chamberlain v. Milwaukee etc. R. Co.,
7 Wis. 425; s. c. 11 Wis. 238. pp.
552, 553, 556.
c 11 Wis. 248; 37 Wis. 322; 23 Wis. 672; 37
Mo. 543; 3 Sawyer, 440; 5 Biss. 317; 18 Wis.
708; 46 Texas, 539. ? 17 Ohio St. 211; 2 Col.
448; 42 Ala. 723; 28 Ind. 374.
- Chamberlain v. Western Transp. Co.,
44 N. Y. 305; s. c. 45 Barb. 218.
pp. 484, 485, 486, 521, 530.
- Champion v. Bostwick, 18 Wend. 175.
p. 412. (See Bostwick v. Champion.)
c 2 Sawyer, 25; 12 Wall. 85; 19 Barb. 237;
11 Allen, 296; 99 Mass. 257.
- Chapman v. New Haven R. Co., 19 N.
Y. 341. pp. 283, 284, 290.
- Check v. Little Miami R. Co., 2 Disney,
237; s. c. 7 Am. L. Reg. 427. pp.
514, 530.
- Cheney v. Boston etc. R. Co., 11 Mete.
121. pp. 70, 377.
c 67 Me. 165; 17 Alb. L. J. 367; 6 Cent. L.
J. 382; 22 Barb. 132; 47 Iowa, 86; 51 Ill. 340;
10 Ch. Leg. N. 78; 6 Reporter, 490; 50 Ind.
144; 2 Cent. L. J. 830; 15 Gray, 450; 63 Me.

- 304; 71 Pa. St. 436, 437; 43 Ill. 423; 46 N. H. 219, 221, 222; 55 Ind. 372; 14 Allen, 436.
Chicago v. Major, 18 Ill. 349. p. 552.
 e 83 Ill. 205, 206, 207; 26 Ill. 389, 401, 402, 403; 18 Ohio St. 412; 75 Ill. 471; 42 Ill. 176; 45 Ill. 205; 43 Ill. 346; 48 Ill. 412; 20 Ill. 490, 496; 3 Dill. 126; 52 Ill. 295; 53 Ind. 156; 22 Wis. 618, 619; 5 Wall. 106; 1 Ch. Leg. N. 105; 41 Iowa, 80; 8 Minn. 166.
Chicago City R. Co. v. Munford, 21 Alb. L. J. 214. p. 442, 444.
Chicago City R. Co. v. Young, 62 Ill. 238. p. 562.
Chicago etc. R. Co. v. Bell, 70 Ill. 102. p. 271.
Chicago etc. R. Co. v. Boger, 1 Bradw. 472. pp. 340, 376, 377, 557.
Chicago etc. R. Co. v. Boyce, 73 Ill. 510. pp. 512, 534, 535.
Chicago etc. R. Co. v. Clayton, 78 Ill. 616. p. 514.
Chicago etc. R. Co. v. Collins, 56 Ill. 212. p. 513.
Chicago etc. R. Co. v. Coss, 73 Ill. 394. pp. 270, 554.
 e 2 Bradw. 43.
Chicago etc. R. Co. v. Dewey, 26 Ill. 255. p. 270.
 e 42 Miss. 614; 73 Ill. 397; 81 Ill. 454; 46 Ill. 83; 71 Ill. 607; 49 Ill. 503, 504; 52 Ill. 330; 28 Mich. 42; 72 Ill. 388, 397; 54 Ill. 484; 37 Ill. 341; 2 Bradw. 38.
Chicago etc. R. Co. v. Fahey, 52 Ill. 81. pp. 434, 520, 521.
Chicago etc. R. Co. v. Fairclough, 52 Ill. 106. pp. 534, 535.
 e 53 Ill. 232.
Chicago etc. R. Co. v. Fay, 16 Ill. 568. p. 333.
Chicago etc. R. Co. v. Fillmore, 57 Ill. 265. pp. 107, 558, 584.
Chicago etc. R. Co. v. Flagg, 43 Ill. 364. pp. 341, 343, 377, 571, 579.
 e 59 Ind. 323; 79 Ill. 590, 591; 42 Ill. 429; 43 Ill. 422; 67 Ill. 114, 314.
Chicago etc. R. Co. v. George, 19 Ill. 510. pp. 202, 224.
 e 26 Ill. 387; 88 Ill. 614.
Chicago etc. R. Co. v. Gregory, 58 Ill. 272. p. 552.
Chicago etc. R. Co. v. Griffin, 68 Ill. 499. pp. 301, 303, 338, 375, 376, 577.
 e 37 Mich. 346.
Chicago etc. R. Co. v. Hazzard, 26 Ill. 373. pp. 228, 333, 552.
 e 59 Ind. 322, 323; 41 Ind. 499; 58 Me. 197; 42 Miss. 614; 30 Ill. 24.
Chicago etc. R. Co. v. Herring, 57 Ill. 59. p. 576.
Chicago etc. R. Co. v. Hughes, 69 Ill. 170. p. 583.
Chicago etc. R. Co. v. McCarthy, 20 Ill. 385. p. 418.
Chicago etc. R. Co. v. Mitchie, 83 Ill. 427. p. 44.
Chicago etc. R. Co. v. Morris, 26 Ill. 400. p. 549.
 e 29 Gratt. 439; 1 Ch. Leg. N. 105; 39 Iowa, 255; 4 Col. 81; 75 Ill. 471; 45 Ill. 205; 43 Ill. 346; 48 Ill. 412; 53 Ind. 156; 52 Ill. 295; 77 Ill. 72; 5 Wall. 106; 42 Ill. 171; 2 Bradw. 313. ? 1 Biss. 415.
Chicago etc. R. Co. v. Mumford, 21 Alb. L. J. 214. p. 268.
Chicago etc. R. Co. v. Parks, 18 Ill. 460. pp. 317, 340, 376, 579. (In full, p. 319.)
 e 42 Miss. 329; 36 Wis. 464; 7 Phila. 13; 15 N. Y. S. C. (T. & C.) 581; 51 Ind. 570; 48 Ill. 257; 43 Ill. 366, 368; 15 Minn. 56; 19 Ill. 363, 364; 63 Ill. 307; 21 Ill. 189; 43 Ill. 423; 56 Ala. 252. d 43 Ill. 179; 79 Ill. 590.
Chicago etc. R. Co. v. Peacock, 48 Ill. 253. pp. 340, 376, 377, 580.
 e 63 Ill. 307. d 79 Ill. 590.
Chicago etc. R. Co. v. Pondrom, 51 Ill. 333; s. c. 2 Ch. Leg. N. 169. pp. 259, 583.
 e 39 Md. 351.
Chicago etc. R. Co. v. Randolph, 53 Ill. 510. pp. 67, 228, 267, 343.
 e 52 Ind. 546; 78 Ill. 94; 3 Cent. L. J. 416; 55 Ind. 372.
Chicago etc. R. Co. v. Roberts, 40 Ill. 503. pp. 376, 377, 579.
 e 63 Ill. 307. d 43 Ill. 368; 79 Ill. 590.
Chicago etc. R. Co. v. Scates, 9 Cent. L. J. 167. pp. 106, 226, 267.
Chicago etc. R. Co. v. Shannon, 43 Ill. 338. p. 550.
 e 70 Ill. 215; 75 Ill. 471; 58 Ill. 284; 83 Ill. 207; 45 Ill. 204; 63 Ill. 295; 68 Ill. 552; 48 Ill. 412; 52 Ill. 296; 77 Ill. 72, 225; 71 Ill. 296.
Chicago etc. R. Co. v. Taylor, 69 Ill. 461. p. 224.
Chicago etc. R. Co. v. Whipple, 22 Ill. 105. p. 418.

- Chicago etc. R. Co. v. Williams, 55 Ill. 185. pp. 301, 345, 346, 574, 580.
- Chicago etc. R. Co. v. Wilson, 63 Ill. 167. pp. 105, 107, 223, 269.
- Chicago etc. R. Co. v. Young, 62 Ill. 238. p. 444.
- Child v. Hearn, L. R. 9 Exch. 176. p. 287.
- Chilton v. London etc. R. Co., 16 Mee. & W. 212. pp. 337, 373.
 e 19 Ill. 373; Irish Rep. 1 C. L. 142, 144, 149, 156, 159. ? 3 C. P. Div. 431, 434, 436.
- Chisholm v. Northern Transp. Co., 61 Barb. 363. pp. 475, 485, 487, 530.
- Christie v. Griggs, 2 Camp. 79. pp. 115, 119, 126, 130, 131, 134, 135, 145, 155, 185, 187, 191, 198, 199, 211, 236, 238, 355, 451, 453. (In full, p. 181.)
 e 2 Duv. 558; 3 Cliff. 419; 21 Md. 283, 288, 296; 18 N. Y. 411, 538; 34 Barb. 268; 38 Miss. 275; 13 Pet. 191; 48 N. H. 312; 4 Iowa, 549; 2 Mont. 526, 527; L. R. 4 Q. B. 388; 8 Best & S. 379, 384, 386, 401; L. R. 2 Q. B. 185, 187, 188, 194; 19 Ill. 517; 58 N. Y. 138; 13 Wend. 627; 1 Duer, 241; 1 McCord, 447; 12 Ga. 224; Irish Rep. 13 C. L. 546; 3 E. D. Smith, 333; 4 Gill, 423; 11 Pick. 112; L. R. 5 Q. B. 194; 15 Ill. 469; 16 Barb. 116, 117; 9 Metc. 9; 11 Gratt. 715; 23 N. H. 284. d 2 Moo. & S. 623.
- Cincinnati etc. R. Co. v. Cole, 29 Ohio St. 126. pp. 341, 573.
- Cincinnati etc. R. Co. v. Marcus, 38 Ill. 219. pp. 510, 511, 512, 520.
 e 73 Ill. 352; 56 Ill. 295; 66 Ill. 479. d 73 Ill. 357.
- Cincinnati etc. R. Co. v. Pontius, 19 Ohio St. 221. p. 387.
- Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 32. p. 176.
- Citizens' Street R. Co. v. Carey, 56 Ind. 396. p. 442.
- City of Brussels (The), 6 Ben. 370. pp. 475, 544, 546.
- City of Hartford (The) and The Unit, 11 Blatchf. 290. p. 487.
- Civil-Rights Bill (The), 1 Hughes, 541. pp. 347, 348.
- Clapp v. Hudson River R. Co., 19 Barb. 461. pp. 577, 583.
- Clark v. Barrington, 41 N. H. 44. p. 220.
 e 22 Wis. 680; 29 Wis. 304; 51 Me. 140; 43 N. H. 268; 11 N. H. 321; 42 N. H. 213, 215; 13 Hun, 86; 48 N. H. 316.
- Clark v. Board of Directors, 24 Iowa, 267. p. 349.
- Clark v. Burns, 118 Mass. 275. pp. 472, 518.
 e 19 Alb. L. J. 114.
- Clark v. Eighth Avenue R. Co., 32 Barb. 657; s. c. 7 Bosw. 122; 36 N. Y. 135. pp. 260, 261, 263, 445.
 e 67 N. Y. 55, 597; 1 Sweeny, 498; 8 Hun, 498.
- Clark v. Faxon, 20 Wend. 153. p. 526.
- Clark v. Gray, 4 Esp. 177. p. 491.
- Cleveland v. New Jersey Steamboat Co., 68 N. Y. 306; s. c. 5 Hun, 523; 4 Abb. N. C. 462. pp. 43, 464, 473.
- Cleveland etc. R. Co. v. Bartram, 11 Ohio St. 457. pp. 70, 329, 343.
 e 50 Ind. 144; 2 Cent. L. J. 830; 6 Reporter, 490; 47 Iowa, 86; 10 Ch. Leg. N. 78; 5 Daly, 51; 71 Pa. St. 436, 437; 55 Ind. 372; 34 Md. 536; 32 Iowa, 536; 56 Ala. 252.
- Cleveland etc. R. Co. v. Curran, 19 Ohio St. 1. pp. 46, 387, 388, 401.
 e 17 How. 369, 370; 47 Ind. 486; 5 Neb. 121; 20 Minn. 130.
- Cleveland etc. R. Co. v. Manson, 30 Ohio St. 451. p. 265.
- Cleveland etc. R. Co. v. Terry, 8 Ohio St. 570. p. 284.
- Clussman v. Long Island etc. R. Co., 9 Hun, 61. pp. 51, 107.
- Clymer v. Central R. Co., 5 Blatchf. 317. pp. 417, 418.
- Cockle v. London etc. R. Co., 41 L. J. (C. P.) 140; s. c. L. R. 7 C. P. 321; 20 Week. Rep. 754; 27 L. T. (N. S.) 320; 39 L. J. (C. P.) 226; L. R. 5 C. P. 457; 18 Week. Rep. 759; 22 L. T. (N. S.) 513. pp. 229, 231, 232, 233, 268.
 e 28 Mich. 453; 2 Q. B. Div. 87; 2 Exch. Div. 252; 44 L. J. (Q. B.) 113; L. R. 10 Q. B. 273; Irish Rep. 7 C. L. 45; 40 L. J. (Q. B.) 191; L. R. 6 Q. B. 382, 384; 43 L. J. (Q. B.) 162; L. R. 9 C. P. 132; 43 L. J. (C. P.) 139; 36 Upper Canada Q. B. 371. d 43 L. J. (Q. B.) 11, 12; L. R. 9 Q. B. 71.
- Coger v. North-Western Union Packet Co., 37 Iowa, 145. p. 349.
 d 95 U. S. 508.
- Coggs v. Bernard, 2 Ld. Raym. 909. pp. 34, 40, 41, 128, 132, 137, 150, 492, 493, 521.

- Cohen v. Dry Dock R. Co., 69 N. Y. 170. pp. 368, 371, 374.
- Cohen v. Frost, 2 Duer, 335. pp. 472, 518.
 c 19 Wis. 42; 1 Daly, 153, 154. ? 15 Mich. 133.
- Cohen v. South-Eastern R. Co., 2 Exch. Div. 253; s. c. 1 Exch. Div. 217. p. 526.
 c 3 C. P. Div. 225; 18 Alb. L. J. 33; 2 App. Cas. 804, 807.
- Cole v. Goodwin, 13 Wend. 251. pp. 5, 236, 381, 410, 418, 436, 526, 532.
 c 15 Mich. 127, 133; 30 N. Y. 615; 4 Bosw. 233, 238; 17 How. 361; 47 Ind. 486; 10 N. H. 488; 7 Hill, 563; 25 N. Y. 461; 11 Cush. 99; 34 N. Y. 551; 21 Wend. 361; 29 Barb. 47, 49; 49 Barb. 155; 11 N. Y. 490; 6 Ind. 245; 16 Pa. St. 77, 78; 45 Barb. 219; 10 Ohio St. 70; 14 Barb. 526; 66 Ill. 477; 21 Ga. 539; 1 Woods, 517; 4 Sandf. S. C. 142, 144; 2 Ohio St. 136; 2 Hill, 624; 23 Vt. 205; 16 Vt. 61; 13 Ill. 750; 1 Daly, 199; 1 E. D. Smith, 99; 29 Iowa, 361; 3 Hill, 20; 39 Iowa, 249.
- Colegrove v. New York etc. R. Co., 6 Duer, 382; s. c. 20 N. Y. 492. pp. 260, 263, 290, 545.
 c 32 N. Y. 601; 11 Abb. Pr. (N. s.) 420; 35 N. Y. 25; 34 N. Y. 677; 35 Pa. St. 129; 46 Barb. 269, 270; 2 Jones & Sp. 12; 65 Barb. 154; 2 Ben. 237; 11 Abb. Pr. (N. s.) 433; 8 Bosw. 354; 43 Wis. 527; 6 Cent. L. J. 430; 64 N. Y. 147; 46 Pa. St. 161; 56 N. Y. 205; 38 N. Y. 262; 4 Am. L. Reg. (N. s.) 19; 51 Ill. 498. ? 6 Robt. 87.
- Coleman v. New York etc. R. Co., 106 Mass. 160. pp. 317, 339, 375.
 c 36 Wis. 463, 675.
- Coleman v. South-Eastern R. Co., 4 Hurl. & Colt. 699. p. 264.
- Collett v. London etc. R. Co., 15 Jur. 1053; s. c. 20 L. J. (Q. B.) 411; 16 Q. B. 984. p. 45.
 c 51 Pa. St. 326; 34 Upper Canada Q. B. 459, 462; 19 Ohio St. 13; 6 So. Car. 139; 37 Mo. 549.
- Collins v. Albany etc. R. Co., 12 Barb. 492. pp. 261, 267, 557, 582.
 c 37 Mo. 264; 42 Miss. 629. d 24 Ga. 365.
- Collins v. Boston etc. R. Co., 10 Cush. 506. p. 511.
 c 73 Ill. 353, 358; 41 Miss. 678; 7 Reporter, 622; 98 Mass. 84; 6 Hun, 547; 44 N. H. 330, 331; 106 Mass. 148; 33 Ind. 382.
- Colt v. McMechen, 6 Johns. 160. p. 492.
- Columbia etc. R. Co. v. Farrell, 31 Ind. 408. pp. 231, 268.
- Columbus etc. R. Co. v. Arnold, 31 Ind. 182. pp. 48, 222.
 c 46 Texas, 538, 550; 2 Col. 488; 5 Kan. 650; 8 Cent. L. J. 14; 53 Ind. 28. ? 49 Cal. 130.
- Columbus etc. R. Co. v. Powell, 40 Ind. 37. pp. 227, 228, 267, 270.
 c 50 Ind. 144; 5 Cent. L. J. 830.
- Commonwealth (The) v. Power, 7 Metc. 596. pp. 7, 26, 314, 317, 350, 364, 377.
 c 31 Ark. 51; 15 Mich. 132; 15 Gray, 24; 3 Park. Cr. Cas. 237; 5 Ch. Leg. N. 535; 36 Wis. 459, 463; 29 Vt. 163; 53 Me. 283; 7 Iowa, 208; 15 Minn. 53; 15 Gray, 450; 36 Wis. 672, 673; 24 Conn. 260; 15 N. Y. 463; 18 Int. Rev. Rec. 55; 11 Blatchf. 235, 236; 95 U. S. 502; 59 Pa. St. 141.
- Commonwealth (The) v. Vermont etc. R. Co., 108 Mass. 7. p. 46.
- Connolly v. Warren, 106 Mass. 146. p. 512.
- Cooley v. Norton, 4 Cush. 93. p. 558.
- Cooper v. Iowa etc. R. Co., 44 Iowa, 134. p. 224.
- Cooper v. London etc. R. Co., 27 Week. Rep. 474. p. 69.
- Copeland v. New England Ins. Co., 22 Pick. 138. p. 564.
- Coppin v. Braithwaite, 8 Jur. 875. pp. 20, 303, 375, 465, 466.
 c 5 Wall. 615.
- Corbin v. Adams, 6 Cush. 95. p. 558.
- Corbin v. Leader, 10 Bing. 275; s. c. 3 Moo. & P. 751; 6 Car. & P. 32. p. 468.
- Cornman v. Eastern Counties R. Co., 4 Hurl. & N. 781; s. c. 29 L. J. (Exch.) 94; 4 Jur. (N. s.) 657. pp. 83, 87, 90, 101, 105. (In full, p. 76.)
 c 26 Iowa, 145; 37 L. J. (Exch.) 107; L. R. 3 Exch. 149; 8 C. B. (N. s.) 572; 7 Jur. (N. s.) 169; 39 L. J. (C. P.) 335; 6 Hurl. & N. 569; 6 Cent. L. J. 427; 36 L. J. (C. P.) 23; 48 Me. 296. d 5 Hun, 527.
- Costello v. Landwehr, 28 Wis. 522. p. 562.
- Corwin v. New York etc. R. Co., 13 N. Y. 42. p. 222.
 c 20 Iowa, 193; 37 Barb. 518, 519; 27 N. Y. 273, 275; 25 Iowa, 142; 32 Iowa, 562; 16 Ind. 104; 12 Gray, 59; 1 Hun, 380; 3 N. Y. S. C. (T. & C.) 539; 34 N. Y. 432; 67 N. Y. 157; 4 Hun,

764; 42 Mo. 197; 20 Wis. 257; 43 Wis. 631, 633; 27 Barb. 228, 229; 2 Hilt. 498; 98 Mass. 564; 3 Keyes. 201; 55 Barb. 533; 12 Ind. 5, 7; 43 N. Y. 507; 2 N. Y. S. C. (T. & C.) 586; 28 Mich. 515; 26 N. Y. 432; 35 N. Y. 643, 645; 4 Keyes, 131, 134; 4 Abb. App. Dec. 292, 352, 355; 13 Hun, 669; 10 Ind. 39; 16 Kan. 576; 13 Wis. 639; 37 Barb. 198; 32 Barb. 575; 20 Wis. 257; 29 Barb. 649; 21 Ohio St. 594; 18 Cal. 355; 2 N. Y. S. C. (T. & C.) 389.

Cory v. Carter, 48 Ind. 327. p. 349.

Crafter v. Metropolitan R. Co., 1 Harr. 164; s. c. L. R. 1 C. P. 300; 12 Jur. (N. s.) 272; 35 L. J. (C. P.) 132; 14 Week. Rep. 334. pp. 101, 105, 473. (In full, p. 88.)

c 26 Iowa, 145; 28 Mich. 454; 52 N. H. 415. d 5 Hun, 523.

Craig v. Great Western R. Co., 24 Upper Canada Q. B. 504. pp. 70, 377.

c 24 Upper Canada Q. B. 516.

Craker v. Chicago etc. R. Co., 36 Wis. 657. pp. 363, 364, 368, 369, 571, 575, 581.

c 44 Iowa, 318, 322; 39 Wis. 641; 42 Wis. 29, 666, 667, 672, 674, 675, 676, 678; 9 Hun, 673; 42 Wis. 29; 9 Ch. Leg. N. 316.

Cram v. Metropolitan R. Co., 112 Mass. 38. p. 444.

Cramer v. Burlington, 42 Iowa, 315. p. 271.

Crawford v. Cincinnati etc. R. Co., 26 Ohio St. 580. pp. 69, 376.

c 29 Ohio St. 219.

Creed v. Pennsylvania R. Co., 86 Pa. St. 139. pp. 51, 52, 345.

Cregin v. Brooklyn etc. R. Co., 75 N. Y. 192. pp. 544, 546.

Crissey v. Hestonville etc. R. Co., 75 Pa. St. 83. pp. 268, 443, 445, 562, 563.

Crocheron v. North Shore etc. Ferry Co., 56 N. Y. 656. pp. 101, 209, 473. c 68 N. Y. 310, 313; 5 Hun, 527.

Crocker v. New London etc. R. Co., 24 Conn. 249. pp. 341, 342, 376.

c 7 Phila. 13; 15 N. Y. S. C. (T. & C.) 582; 7 Iowa, 209; 7 Bosw. 136; 19 Ill. 374; 36 Conn. 291. ? 15 Minn. 56. o 19 Ill. 364.

Croft v. Allison, 4 Barn. & Ald. 590. p. 358.

Croft v. Baltimore etc. R. Co., 1 McArthur, 492. pp. 432, 436.

Crofts v. Waterhouse, 11 J. B. Moo. 133; s. c. 3 Bing. 319. pp. 114, 115, 117, 119, 130, 133, 153, 155, 199, 236, 237, 238, 355, 403, 453.

c 3 Cliff. 420; 21 Md. 286, 297; 48 N. H. 312; 4 Iowa, 548; L. R. 4 Q. B. 383, 389; 8 Best & S. 379, 383; L. R. 2 Q. B. 419, 423; 6 L. J. (Q. B.) 185, 187; 11 Gratt. 11; 109 Mass. 405; L. R. 5 Q. B. 195. d 9 Metc. 7, 10.

Crogran v. New York etc. R. Co., 18 Alb. L. J. 70. pp. 199, 206.

Crosby v. Maine etc. R. Co., 69 Me. 418; s. c. 8 Reporter, 819. p. 69.

Crozier v. Boston etc. R. Co., 43 How. Pr. 466. p. 531.

Crystal Palace (The) v. Vanderpool, 16 B. Mon. 302. p. 518.

Cully v. Baltimore etc. R. Co., 1 Hughes, 536. pp. 347, 377.

Cumberland Valley etc. R. Co. v. Myers, 55 Pa. St. 288. pp. 49, 52.

Cunningham v. Grand Trunk R. Co., 9 Lower Canada Jur. 57. p. 71.

c 24 Upper Canada Q. B. 518.

Curran v. Cheeseman, 1 Cin. Superior Ct. 52. pp. 480, 554.

Curran v. Warren etc. Man. Co., 36 N. Y. 153. p. 553.

Curtis v. Avon etc. R. Co., 49 Barb. 148. pp. 536, 538.

c 57 N. Y. 559.

Curtis v. Delaware etc. R. Co., 74 N. Y. 116. pp. 512, 534.

Curtis v. Detroit etc. R. Co., 23 Wis. 152; s. c. 27 Wis. 158. p. 225.

Curtis v. Drinkwater, 2 Barn. & Adol. 169; s. c. 22 Eng. Com. Law, 51. pp. 199, 240.

c 8 Pa. St. 484; 4 Gill, 421; 13 Vt. 325; 13 Conn. 325.

Curtis v. Grand Trunk etc. R. Co., 12 Upper Canada C. P. 89. pp. 338, 375.

Curtis v. Rochester etc. R. Co., 18 N. Y. 534; s. c. 20 Barb. 282. pp. 211, 214. (In full, p. 188.)

c 2 Col. 457; 33 Iowa, 269; 44 Miss. 484, 496, 500, 501; 1 Daly, 207; 34 Barb. 267; 24 N. Y. 218, 219; 48 N. Y. 211; 3 Jones & Sp. 130; 2 Ben. 239; 28 N. Y. 225; 35 Barb. 199; 39 N. Y. 229; 11 Wall. 134.

Curtiss v. Rochester etc. R. Co., 20 Barb. 282. (See *Curtis v. Rochester etc.*

R. Co., 18 N. Y. 534.) pp. 551, 564, 569, 571.

D.

Dale v. Brooklyn City R. Co., 1 Hun, 146. pp. 444, 565.

Dale v. Hall, 1 Wils. 281. pp. 132, 452.

Daley v. Norwich etc. R. Co., 26 Conn. 591. p. 293.

Dallas v. Fosdick, 40 How. Pr. 249. p. 349.

Dalyell v. Tyrer, 28 L. J. (Q. B.) 52. p. 285.

Damont v. New Orleans etc. R. Co., 9 La. An. 441. pp. 227, 228, 267.
c 23 La. An. 464.

Daniel v. Metropolitan R. Co., L. R. 5 H. L. 45; 37 L. J. (C. P.) 280. pp. 208, 562.

c 8 Hun, 602; L. R. 9 Exch. 161; 43 L. J. (Exch.) 107.

Daniel Ball (The), 10 Wall. 557. p. 481.

Dansey v. Richardson, 3 El. & Bl. 144. p. 531.

Danville etc. Turnpike Co. v. Stewart, 2 Metc. (Ky.) 119. p. 290.

Dascomb v. Buffalo etc. R. Co., 27 Barb. 221. p. 562.

David v. Moore, 2 Watts & S. 230. p. 538.
c 1 Hilt. 282.

Davidson v. Graham, 2 Ohio St. 131. pp. 387, 393, 525, 526.

Davies v. Mann, 10 Mee. & W. 546; s. c. 2 Thomp. on Neg. 1105. pp. 251, 257, 276, 278.

c 6 Gray, 72; 6 Ohio St. 109; 2 C. B. (N. S.) 756; 4 Ind. 98; 2 Sawyer, 29; 6 Cent. L. J. 46; 45 Md. 491; 16 Pa. St. 466; 22 Vt. 223; L. R. 4 C. P. 621; 19 Conn. 576; 18 N. Y. 253; 8 La. An. 324; 17 Barb. 97; 6 Iowa, 452; 38 Ala. 85, 86; 10 Ch. Leg. N. 121; 1 Handy, 202; 20 Ill. 494; L. R. 9 Exch. 74; 52 N. H. 553, 554; 5 El. & Bl. 202; 43 L. J. (Exch.) 75; L. R. 10 Exch. 107; 44 L. J. (Exch.) 78, 93; 1 App. Cas. 759; 9 Wis. 218; 31 Miss. 193; 15 Q. B. 283; 27 Conn. 406; 5 Duer. 27; 5 Hun, 480; 3 Ohio St. 194; 44 Md. 127; 24 Vt. 495; 6 Ind. 145; 13 Ga. 88; 24 N. J. L. 270, 283; 45 Iowa, 32; 37 Cal. 423; 22 N. J. L. 189; 12 C. B. (N. S.) 9; 10 C. B. (N. S.) 575; 29 Md. 436; 15 Ind. 489; 95 U. S. 442; 8 Rich. L. 126; 52 Mo. 439; 2 Col. 159; 37 Mo. 550.

Davis v. Cayuga etc. R. Co., 10 How. Pr. 330. pp. 42, 513, 514.

c 30 N. Y. 617.

Davis v. Great Western etc. R. Co., 20 Upper Canada Q. B. 27. pp. 65, 376.

Davis v. Kansas City etc. R. Co., 53 Mo. 317. pp. 67, 224, 259.

Davis v. London etc. R. Co., 2 Fost. & Fin. 588. p. 105.

Davis v. Michigan etc. R. Co., 20 Ill. 407; s. c. 22 Ill. 278. pp. 511, 513, 514, 538.

c 30 N. Y. 612; 22 Ill. 214; 15 Mich. 127; 78 Ill. 617, 618; 24 Ill. 336.

Dawson v. Manchester etc. R. Co., 7 Hurl. & N. 1037. p. 212.

Day v. Brooklyn etc. R. Co., 12 Hun, 435. pp. 293, 445.

Day v. Owen, 5 Mich. 520. pp. 28, 29, 314, 316, 317, 335, 346, 348. (In full, p. 306.)

c 36 Wis. 459, 460, 462, 463, 672; 37 Mich. 344; 46 N. H. 219, 223.

Day v. Woodworth, 13 How. 363. p. 573.

Dearden v. Townsend, L. R. 1 Q. B. 10; s. c. 12 Jur. (N. S.) 120; 14 Week. Rep. 52; 13 L. T. (N. S.) 323. p. 337.

c 3 C. P. Div. 433; Irish Rep. 3 C. L. 526; Irish Rep. 1 C. L. 135, 144, 149, 152, 153, 159.

De Benedetti v. Mauchin, 1 Hilt. 213. p. 553.

c 43 Vt. 206.

De Cuir v. Benson, 27 La. An. 1. p. 346.

Deihl v. Woodruff, 10 Cent. L. J. 66. pp. 531, 532.

Delamartyr v. Missouri etc. R. Co., 24 Wis. 578. pp. 229, 233, 268.

c 30 Ohio St. 234, 235.

Del Valle v. Str. Richmond, 27 La. An. 90. pp. 510, 518.

Dennis v. Clark, 2 Cush. 347. p. 547.

Dennison v. The Wataga, 1 Phila. 468. pp. 466, 467.

Denny v. New York etc. R. Co., 5 Daly, 50. p. 70.

Denton v. Great Northern R. Co., 5 El. & Bl. 860; s. c. 2 Jur. (N. S.) 185; 25 L. J. (Q. B.) 129; 34 Eng. Law & Eq. 154. pp. 66, 67. (In full, p. 53.)

c 52 N. H. 600, 604; 19 C. B. (N. S.) 319; 14

- Allen, 437; 34 L. J. (C. P.) 266; 11 Jur. (N. S.) 731, 732; 3 Neb. 54.
- Derwort v. Loomer, 21 Conn. 245; s. c. 1 Am. L. Reg. 479. pp. 205, 242, 563.
 c 48 N. H. 315; 11 Gratt. 712.
- Detroit etc. R. Co. v. Van Steinburg, 17 Mich. 99. pp. 552, 563.
- Dexter v. Syracuse etc. R. Co., 42 N. Y. 326. pp. 510, 512.
 c 6 Hun, 547; 9 Hun, 671.
- Deyo v. New York etc. R. Co., 34 N. Y. 9. pp. 214, 553.
 c 36 N. Y. 381; 4 Daly, 488; 5 Hun, 526.
- Dibble v. Brown, 12 Ga. 217; s. c. 2 Am. L. Reg. 317. pp. 510, 511, 512, 514, 521, 522, 538, 539.
 c 9 Hun, 671; 25 Ga. 64.
- Dickens v. New York etc. R. Co., 28 Barb. 41; s. c. 1 Abb. App. Dec. 504. pp. 226, 270, 563.
 c 1 Biss. 415.
- Dickey v. Maine Tel. Co., 46 Me. 483. p. 552.
- Dickinson v. Colter, 45 Ind. 445. p. 558.
- Dietrich v. Pennsylvania R. Co., 71 Pa. St. 432. pp. 70, 71, 377.
 c 72 Pa. St. 235; 52 Ind. 546; 6 Reporter, 490; 47 Iowa, 86; 10 Ch. Leg. N. 78; 51 Cal. 423; 13 Hun, 362; 76 Pa. St. 73; 55 Ind. 372; 54 N. Y. 516.
- Dill v. South Carolina R. Co., 7 Rich. L. 158. p. 521.
 c 21 Gratt. 669.
- Dillaye v. New York etc. R. Co., 56 Barb. 30. pp. 109, 235, 269.
- Dillon v. Union Pacific R. Co., 3 Dill. 319. p. 553.
 c 119 Mass. 414; 7 Reporter, 61.
- Dinunny v. New York etc. R. Co., 49 N. Y. 546. p. 534.
 c 57 N. Y. 556.
- District v. Saville, 9 Am. L. Rev. 584. p. 347.
- Ditcham v. Chivis, 1 Moo. & P. 735; s. c. 4 Bing. 706. p. 555.
- Ditchett v. Spuyten Duyvil etc. R. Co., 5 Hun, 165. p. 271.
- Doe v. Benjamin, 9 Ad. & E. 644. p. 554.
- Doggett v. Illinois etc. R. Co., 34 Iowa, 284. pp. 252, 265.
- Donnell v. The State, 48 Miss. 661. p. 347.
- Doorman v. Jenkins, 2 Ad. & E. 261; s. c. 4 Nev. & M. 174. p. 75.
- Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485; s. c. 4 Sandf. S. C. 136. pp. 382, 394.
- Doss v. Missouri etc. R. Co., 59 Mo. 27; s. c. 21 Am. Rep. 371; 2 Cent. L. J. 539. pp. 50, 225, 226, 227, 267, 575.
- Dougan v. Champlain Transp. Co., 56 N. Y. 1. pp. 217, 266, 473, 475, 487, 543.
 c 58 N. Y. 143.
- Dougherty v. Chicago etc. R. Co., 86 Ill. 467. pp. 227, 228, 267.
- Downs v. New York etc. R. Co., 36 Conn. 287. pp. 69, 336, 338.
 c 37 Mich. 346. d 28 Conn. 560.
- Doyle v. Kiser, 6 Ind. 243. pp. 511, 513, 522, 538.
 c 8 Bush, 474; 30 N. Y. 612; 41 Miss. 679; 33 Ind. 382.
- D. R. Martin (The), 11 Blatchf. 233; s. c. 18 Int. Rev. Rec. 55. pp. 29, 351.
- Dressler v. Davis, 7 Wis. 527. pp. 552, 553.
- Drew v. Central Pacific R. Co., 51 Cal. 425. pp. 70, 377.
- Drew v. Sixth Avenue R. Co., 26 N. Y. 49. p. 370.
- Dryden v. Grand Trunk R. Co., 60 Me. 512. p. 70.
- D. S. Gregory (The), 2 Ben. 226. pp. 565, 572, 574.
- Dublin etc. R. Co. v. Slattery, 3 App. Cas. 1155; s. c. Irish Rep. 10 C. L. 256. pp. 234, 269, 562.
- Dudley v. Smith, 1 Camp. 167. pp. 114, 237, 451.
 c 8 Pa. St. 484; 46 N. H. 224; 28 Ind. 444.
- Duff v. Great Northern R. Co., 41 L. T. (N. S.) 197; s. c. 20 Alb. L. J. 398. pp. 400, 401.
- Duffy v. Thompson, 4 E. D. Smith, 178. pp. 511, 512, 513.
 c 30 N. Y. 612, 617; 4 E. D. Smith, 453.
- Duke v. Great Western R. Co., 14 Upper Canada Q. B. 369. pp. 338, 376.
 c 12 Upper Canada C. P. 93; 48 Vt. 236.
- Du Laurans v. First Division St. Paul

etc. R. Co., 15 Minn. 49. pp. 335, 341, 342, 376, 575, 577, 588.
Dunlap v. International Steamboat Co., 98 Mass. 371. pp. 485, 511, 518, 530.
 e 73 Ill. 355, 357; 106 Mass. 648; 9 Hun, 671; 7 Reporter, 623.
Dunn v. Grand Trunk R. Co., 58 Me. 187. pp. 52, 344, 345, 445. (In full, p. 328.)
 e 33 Wis. 54, 63; 59 Ind. 333; 20 Minn. 134; 56 Ala. 252; 57 N. Y. 391, 392; 15 Alb. L. J. 62.
 d 64 Mo. 475. ? 49 Texas, 48.
Dunphy v. Erie R. Co., 10 Jones & Sp. 128. p. 70.
Durant v. Palmer, 29 N. J. L. 544. p. 552.
 e 32 N. J. L. 168; 33 N. J. L. 264, 438.
Dwight v. Brewster, 1 Pick. 50. p. 501.
Dyer v. Talcott, 16 Ill. 300. p. 552.
Dysart v. Montgomery, Irish Rep. 8 C. L. 245. p. 474.

E.

East India Co. v. Pullen, Stra. 690. pp. 515, 516.
East Saginaw Street R. Co. v. Bohn, 27 Mich. 503. pp. 291, 345, 445.
Eastern Counties R. Co. v. Broom, 6 Exch. 314; s. c. 20 L. J. (Exch.) 196. pp. 373, 545.
 e 30 L. J. (Q. B.) 150, 152; 3 El. & El. 678, 683; L. R. 3 C. P. 643; Irish Rep. 5 C. L. 16; 19 Ill. 373; Irish Rep. 1 C. L. 146; 15 Upper Canada C. P. 440.
Eaton v. Boston etc. R. Co., 11 Allen, 500. p. 291.
 e 97 Mass. 368; 5 Hun, 526.
Eaton v. Delaware etc. R. Co., 57 N. Y. 382. p. 344.
 d 66 N. Y. 619.
Eckert v. Long Island R. Co., 43 N. Y. 502; s. c. 57 Barb. 555. p. 20.
 e 53 Ala. 57, 58; 6 Jones & Sp. 418; 13 Hun, 331; 68 Me. 556; 8 Cent. L. J. 444.
Edgerton v. New York etc. R. Co., 39 N. Y. 227; s. c. 35 Barb. 193. pp. 212, 234, 333.
 e 59 Ind. 233; 47 Ind. 481; 1 Sweeny, 498; 63 Barb. 266; 58 Me. 196; 4 Col. 10.
Edwards v. London etc. R. Co., L. R. 5 C. P. 445. pp. 371, 372.
 e L. R. 6 Q. B. 70, 71.
Edwards v. Lord, 49 Me. 279. p. 200.
 e 56 Me. 241; 48 N. H. 315.
Eldridge v. Long Island R. Co., 1 Sandf. S. C. 89. pp. 267, 548.
 e 24 Ga. 366.
Elizabethport etc. Ferry Co. v. United States, 5 Blatchf. 198. p. 481.
Elliott v. Rossell, 10 Johns. 1. p. 492.
Ellis v. Narragansett Steamship Co., 111 Mass. 146. pp. 349, 469.
Ellsworth v. Tartt, 26 Ala. 733; s. c. 4 Am. L. Reg. 189. p. 436.
 e 29 Vt. 426; 7 Am. L. Reg. 430; 1 Cent. L. J. 542.
Elmore v. Sands, 54 N. Y. 512. pp. 65, 71, 376.
 e 7 Hun, 142, 146; 13 Hun, 362; 3 Hun, 242; 5 Thomp. & C. 557; 7 Hun, 672, 673.
Elvira Harbeck (The), 2 Blatchf. 336. pp. 471, 520, 521, 522.
Empire Transp. Co. v. Wamsutta Oil Co., 63 Pa. St. 14. p. 387.
English v. Delaware etc. Canal Co., 66 N. Y. 454; s. c. 4 Hun, 683. p. 374.
Erie v. Schwingle, 22 Pa. St. 384. p. 552.
 e 7 Cent. L. J. 129; 79 Pa. St. 416; 56 Pa. St. 451; 68 Pa. St. 407; 73 Pa. St. 409; 9 Md. 178; 91 U. S. 551; 2 Disney, 521; 21 Iowa, 414; 67 Pa. St. 367; 63 Pa. St. 289; 79 Pa. St. 416; 32 Iowa, 328; 20 Md. 480; 31 Mich. 122; 122 Mass. 376; 71 Pa. St. 158; 17 Minn. 314; 26 Iowa, 268; 1 Black, 53; 16 Wall. 574. ? 4 Mich. 562.
Ernst v. Hudson etc. R. Co., 35 N. Y. 9; s. c. 39 N. Y. 61; 32 Barb. 159; 32 How. Pr. 262; 119 How. Pr. 205.
 e 3 Daly, 383; 34 N. Y. 633; 40 N. Y. 11, 31; 14 Abb. Pr. (N. s.) 30; 43 Mo. 194; 39 N. Y. 362, 363; 33 Ind. 360; 39 N. J. L. 193, 194; 34 Iowa, 158, 160; 34 How. Pr. 249; 4 Robt. 346; 7 Robt. 616; 49 Barb. 531, 532, 535; 3 Keyes, 479; 1 Abb. App. Dec. 438; 7 Hun, 560, 562; 1 Wils. (Indianapolis), 491; 6 Hun, 466; 37 N. Y. 574; 17 Mich. 118, 123; 34 Iowa, 279; 21 Minn. 295; 50 Ind. 45; 32 Wis. 275; 20 Mich. 166; 45 N. Y. 664; 54 N. Y. 471; 38 N. Y. 442, 443; 40 Barb. 210; 39 How. Pr. 414, 423; 7 Lans. 13; 42 N. Y. 473; 41 N. Y. 299; 26 Wis. 255; 38 N. Y. 51; 2 Lans. 437; 43 Mo. 262; 44 Mo. 294; 25 Mich. 295; 1 N. Y. S. C. (T. & C.) 246; 38 N. Y. 449; 44 N. Y. 469, 474, 477; 2 Jones & Sp. 486; 43 How. Pr. 411; 21 Ohio St. 593; 36 N. Y. 133, 134.
Evans v. Memphis etc. R. Co., 56 Ala. 246. p. 343.

Evansville etc. R. Co. v. Baum, 26 Ind. 70. pp. 366, 368, 549.

c 57 Me. 239, 245; 51 Ind. 248.

Evansville etc. R. Co. v. Dexter, 24 Ind. 411. p. 552.

Evansville etc. R. Co. v. Duncan, 28 Ind. 441. pp. 29, 268.

c 55 Ind. 372. d 44 Miss. 487.

Evansville etc. R. Co. v. Hiatt, 17 Ill. 102. p. 552.

Express Co. v. Kountze Brothers, 8 Wall. 342. p. 392.

Express Co. v. Sands, 55 Pa. St. 140. p. 386.

F.

Fairchild v. California Stage Co., 13 Cal. 599. pp. 199, 205, 211, 238, 571.

c 2 Mont. 522, 525, 526; 48 N. H. 316; 6 Nev. 233, 234.

Fairfax v. New York etc. R. Co., 5 Jones & Sp. 516; s. c. 40 N. Y. Superior Ct. 128. pp. 434, 435, 520.

Fairmount etc. R. Co. v. Stutler, 54 Pa. St. 375. pp. 227, 546.

c 57 Barb. 651.

Falkiner v. Great Southern R. Co., Irish Rep. 5 C. L. 213. pp. 198, 234.

Farewell v. Grand Trunk R. Co., 15 Upper Canada C. P. 427. pp. 71, 376.

c 24 Upper Canada Q. B. 517.

Farnham v. Camden etc. R. Co., 55 Pa. St. 53. pp. 386, 387.

Faulkner v. Ohio etc. R. Co., 55 Ind. 369. p. 343.

c 57 Ind. 579.

Farish v. Reigle, 11 Gratt. 697. pp. 205, 211, 217, 238, 577, 585.

c 29 Gratt. 445; 13 Cal. 603; 2 Mont. 525, 526.

Farwell v. Boston etc. R. Co., 4 Metc. 49; s. c. 2 Thomp. on Neg. 924. p. 33.

c 3 Col. 501; 25 Md. 479; 29 Conn. 560; 49 N. Y. 532; 10 Mich. 199; 30 Barb. 234, 235, 236; 34 Conn. 479; 10 Gray, 281; 119 Mass. 421; 62 Mo. 328; 2 Mich. 265; 42 Md. 418; 25 N. Y. 564; 44 Cal. 82; 2 Hurl. & Colt. 111; 9 Jur. (N. s.) 502; 32 L. J. (Exch.) 209; 49 Barb. 577; 8 Ohio St. 256; 5 Hun, 493; 27 Md. 601; 25 Md. 479; 17 N. Y. 157; 8 Allen, 444; 11 Iowa, 427; 76 Ill. 397; 8 Kan. 650; 22 Ala. 308, 311, 312; 5 Best & S. 578; 33 L. J. (Q. B.) 264, 268; 10 Jur. (N. s.) 1076; 59 Pa. St. 247, 248, 251; 28 Ind. 377; 6 Jones L. 248; 64 Mo. 118; 46 Texas, 538;

23 Pa. St. 386; 6 Cush. 76; 4 Gray, 101; 53 Ga. 16; 4 Jur. (N. s.) 772; 53 N. Y. 552; 6 Cal. 210; 9 Cush. 114; 1 Am. L. Reg. 718; 20 Md. 221, 222; 6 Hill, 594; 7 La. An. 324, 332; 43 Me. 270; 11 Wis. 254; 14 Minn. 363, 364; 15 Ill. 551; 21 Ill. 26; 51 Miss. 642; 10 Mich. 199; 43 Mo. 193; 3 Ohio St. 212, 215, 223; 12 Ohio St. 491; 59 Mo. 300; 15 Minn. 537; 10 Allen, 237, 238; 10 Cush. 231; 3 Cush. 273; 6 Ind. 207, 208; 30 Mo. 116; 24 Ala. 36; 102 Mass. 583; 5 N. Y. 494, 496; 6 Barb. 236, 240, 243; 3 Ohio St. 188; 3 Sawyer, 442; 20 Ohio, 441, 443, 445, 447; 9 Heisk. 869; 18 Iowa, 287; 49 Barb. 326; 42 N. H. 236; 49 Texas, 189; 28 Ind. 377; 1 Ga. 198; 44 Cal. 82; 44 Miss. 485; 1 Woods, 403; 38 Miss. 275; 97 Mass. 368; 4 Iowa, 549; 24 N. Y. 220; 11 Wis. 254; 58 N. Y. 134; 20 Ohio, 435; 1 Am. L. Reg. 399; 2 Am. L. T. 120; 14 How. 489. ? 5 Ind. 343, 344, 345, 346, 347; 9 Bush, 565; 6 Bush 579.

Fay v. Parker, 53 N. H. 342. p. 573.

Feltham v. England, L. R. 2 Q. B. 33; s. c. 4 Fost. & Fin. 460; 7 Best & S. 676. p. 147.

c 13 Allen, 441; 62 Me. 466; 64 N. Y. 9, 11; 32 Md. 418; L. R. 1 Sc. App. 339; 59 Pa. St. 252; 1 Exch. Div. 255; 49 Barb. 326.

Fent v. Toledo etc. R. Co., 59 Ill. 349; s. c. 1 Thomp. on Neg. 136. p. 564.

c 12 Kan. 379; 39 N. J. L. 307, 311; 94 U. S. 474; 6 Cent. L. J. 313; 80 Pa. St. 379; 85 Ill. 14; 71 Ill. 574; 57 N. H. 91.

Fernandez v. Sacramento R. Co., 4 Cent. L. J. 82. p. 563.

Filer v. New York etc. R. Co., 68 N. Y. 124; s. c. 49 N. Y. 42; 59 N. Y. 352; 1 Abb. N. C. 523. pp. 228, 267.

c 30 Ohio St. 234, 236, 237; 67 N. Y. 55; 59 Mo. 38; 2 Cent. L. J. 541; 3 N. Y. S. C. (T. & C.) 45; 63 N. Y. 560; 68 N. Y. 127; 59 N. Y. 352.

Fillebrown v. Grand Trunk R. Co., 55 Me. 462. p. 66.

Fink v. Albany etc. R. Co., 4 Lans. 147. p. 66.

First National Bank v. Marietta etc. R. Co., 20 Ohio St. 259. p. 512.

c 17 Am. L. Reg. (N. s.) 511, 514; 72 N. Y. 58, 62; 9 Hun, 672; 6 Reporter, 55.

Fisher v. Geddes, 15 La. An. 14. p. 532.

Fitzpatrick v. New Albany etc. R. Co., 7 Ind. 436. p. 49.

Flaherty v. Greenman, 7 Daly, 481. pp. 514, 524.

Fleming v. Brooklyn etc. R. Co., 1 Abb. N. C. 433. pp. 46, 293.

- Flemming v. Western Pacific R. Co.*, 49 Cal. 253. p. 562.
- Fletcher v. Boston etc. R. Co.*, 1 Allen, 9. pp. 417, 418.
- Flinn v. Philadelphia etc. R. Co.*, 1 Houst. 469. pp. 27, 45, 234, 369, 401. e 17 How. 371; 47 Ind. 486.
- Flint v. Norwich etc. Transp. Co.*, 34 Conn. 554; s. c. 6 Blatchf. 158. pp. 303, 304, 360, 364. e 3 Cliff. 426; 53 Miss. 221; 55 N. Y. 113, 118; 68 N. Y. 310; 5 Hun, 526; 57 Me. 216; 7 Reporter, 461. d 17 Am. L. Reg. (N. S.) 615; 72 N. Y. 62; 6 Reporter, 56.
- Flint etc. R. Co. v. Weir*, 37 Mich. 111. p. 524.
- Foot v. Wiswall*, 14 Johns. 304. p. 562.
- Forbes v. Davis*, 18 Texas, 268. pp. 513, 515, 545.
- Ford v. London etc. R. Co.*, 2 Fost. & Fin. 730. pp. 139, 148, 156, 199, 209. e 56 Me. 241; 97 Mass. 368; 8 Best & S. 393, 404; 36 L. J. (Q. B.) 190, 196; L. R. 2 Q. B. 430, 441; L. R. 4 Q. B. 389.
- Fordham v. London etc. R. Co.*, 37 L. J. (C. P.) 176; s. c. L. R. 3 C. P. 300; L. R. 4 C. P. 619. p. 264. e 100 Mass. 215.
- Forks Township v. King*, 84 Pa. St. 230. p. 284.
- Forsyth v. Boston etc. R. Co.*, 103 Mass. 510. p. 269. e 104 Mass. 141.
- Fort Wayne etc. R. Co. v. Gildersleeve*, 33 Mich. 133. p. 208. e 33 Mich. 257; 6 Reporter, 111; 68 Me. 51.
- Forward v. Pittard*, 1 Term Rep. 27. pp. 492, 493, 495, 498.
- Foster v. Dixfield*, 18 Me. 380. p. 552.
- Foster v. The Essex Bank*, 17 Mass. 479. p. 178.
- Foulkes v. Metropolitan District R. Co.*, 4 C. P. Div. 267. p. 435.
- Fowle v. Alexandria*, 11 Wheat. 322. p. 564.
- Fox v. Glastenbury*, 29 Conn. 204. p. 552.
- Foy v. London etc. R. Co.*, 18 C. B. (N. S.) 225; s. c. 13 Week. Rep. 293; 11 L. T. (N. S.) 606. pp. 229, 268. e 44 Miss. 487; 28 Mich. 453; 44 L. J. (Q. B.) 114; L. R. 10 Q. B. 274; L. R. 3 Exch. 157; L. R. 4 Exch. 121; 37 L. J. (Exch.) 103; 42 Mo. 587; 59 Mo. 38; 2 Cent. L. J. 541; 49 N. Y. 54. d 39 L. J. (Exch.) 99, 101; L. R. 3 Exch. 153, 155; L. R. 4 Exch. 122, 124, 125.
- Fraloff v. New York etc. R. Co.*, 10 Blatchf. 16. pp. 504, 512, 536, 537, 547.
- Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7. pp. 566, 570.
- Frech v. Philadelphia etc. R. Co.*, 39 Md. 574. p. 552. e 43 Md. 552.
- Freeman v. Newton*, 3 E. D. Smith, 246. pp. 514, 529, 530, 547.
- Frederick v. Marquette etc. R. Co.*, 37 Mich. 342. pp. 338, 376.
- French v. Brunswick*, 21 Me. 29. p. 552. e 11 Allen, 320; 42 Me. 527; 45 Ind. 433; 9 Hun, 685; 35 N. H. 276; 6 Iowa, 452; 1 Cush. 447.
- Frink v. Coe*, 4 G. Greene (Iowa), 555. pp. 205, 557, 574. e 48 N. H. 316.
- Frink v. Potter*, 11 Ill. 406; s. c. 17 Ill. 496. pp. 199, 217, 266, 544, 545, 560. e 48 N. H. 316; 88 Ill. 614.
- Frink v. Schroyer*, 18 Ill. 416. p. 564. e 54 Ill. 24.
- Frost v. Grand Trunk R. Co.*, 10 Allen, 387; s. c. 5 Am. L. Reg. (N. S.) 573. pp. 101, 233, 269. e 26 Iowa, 145.
- Fuller v. Naugatuck R. Co.*, 21 Conn. 557. pp. 104, 548, 561. e 26 Iowa, 140; 48 N. H. 315; 19 Ohio St. 235.
- Fulton v. Grand Trunk R. Co.*, 17 Upper Canada Q. B. 428. pp. 329, 340, 376, 377. e 58 Me. 192.
- Furstenheim v. Memphis etc. R. Co.*, 9 Heisk. 238. pp. 433, 515. o 1 Cent. L. J. 542.

G.

Gagg v. Vetter, 41 Ind. 228. p. 562.

e 51 Ind. 154.

Gale v. Delaware etc. R. Co., 7 Hun, 670. pp. 70, 71, 377.

e 13 Hun, 362.

Galena etc. R. Co. v. Fay, 16 Ill. 558. pp. 267, 333, 552, 557.

e 59 Ind. 323; 86 Ill. 376, 381, 386; 48 N. H. 316; 88 Ill. 614; 16 Ill. 567.

Galena etc. R. Co. v. Jacobs, 20 Ill. 478. p. 552.

c 51 Ill. 340; 58 Ill. 282, 306; 59 Ill. 536; 26 Ill. 385, 386; 46 Ill. 83; 49 Ill. 503; 19 Ill. 510; 52 Ill. 330; 64 Ill. 516; 72 Ill. 226, 388; 71 Ill. 509; 80 Ill. 257; 9 Wis. 220; 5 Kan. 179; 6 Or. 424; 37 Ill. 340, 341; 2 Bradw. 38.

Galena etc. R. Co. v. Loomis, 13 Ill. 548. p. 323.

c 33 Ind. 362; 34 Iowa, 157; 67 Ill. 116; 63 Ill. 125; 16 Ill. 202; 35 Iowa, 194; 68 Ill. 318; 63 Ill. 120; 25 Mich. 291; 21 Ohio St. 593; 41 Iowa, 304; 27 Vt. 155; 63 Ill. 94; 25 Ill. 145; 18 Ill. 468.

Galena etc. R. Co. v. Yarwood, 15 Ill. 468; s. c. 17 Ill. 509. pp. 211, 252, 267, 357.

c 33 Iowa, 534; 3 Cliff. 422; 7 Ind. 478; 24 Ga. 366; 6 Cent. L. J. 47; 48 N. H. 315; 37 Mo. 547; 26 Ill. 386; 95 U. S. 443; 88 Ill. 614.

Gallin v. London etc. R. Co., 23 Week. Rep. 308; s. c. 32 L. T. (N. S.) 550; 44 L. J. (Q. B.) 89; L. R. 10 Q. B. 212; 2 Cent. L. J. 217. pp. 400, 401, 402.

c 43 Conn. 340.

Garvey v. Camden etc. R. Co., 1 Hilt. 280. pp. 538, 539.

Gautret v. Edgerton, L. R. 2 C. P. 371; s. c. 36 L. J. (C. P.) 191; 15 Week. Rep. 638; 16 L. T. (N. S.) 17. p. 226.

c 62 Mo. 561; 59 Mo. 36; 41 Ind. 250; 47 Ind. 48; 46 Md. 218; 55 How. Pr. 173; 41 N. Y. 533; 98 Mass. 578; 25 Mich. 9; 34 N. J. L. 472; 2 Cent. L. J. 540.

Gavett v. Manchester etc. R. Co., 16 Gray, 501. pp. 227, 252, 267.

c 14 Allen, 433; 8 Allen, 235; 7 Allen, 209; 3 Allen, 22; 65 N. Y. 560; 6 Cent. L. J. 47.

Gay v. Winter, 34 Cal. 153. p. 552.

Gaynor v. Old Colony etc. R. Co., 100 Mass. 208. pp. 270, 551, 562, 563.

c 30 Ohio St. 238, 243; 108 Mass. 12; 105 Mass. 79; 103 Mass. 514; 55 Ind. 50; 120 Mass. 265; 123 Mass. 515; 6 Cent. L. J. 138; 5 Reporter, 238; 104 Mass. 116, 141; 56 Ind. 520; 4 Cent. L. J. 84; 8 Cent. L. J. 444.

Gee v. Metropolitan R. Co., 21 Week. Rep. 584; s. c. 42 L. J. (Q. B.) 105; 25 L. T. (N. S.) 822; L. R. 8 Q. B. 165; 28 L. T. (N. S.) 282. pp. 210 229, 263.

c 44 L. J. (Q. B.) 113, 114; L. R. 10 Q. B. 274, 275; 36 Upper Canada Q. B. 371.

Georgia etc. R. Co. v. McCurdy, 45 Ga. 288. pp. 227, 267, 577, 583.

Gerhard v. Bates, 2 El. & Bl. 476. p. 55.

Gibbon v. Paynton, 4 Burr. 2298. pp. 497, 498.

Gibbons v. Ogden, 9 Wheat. 1. p. 475.

Gibson v. Bradford, 4 El. & Bl. 568; s. c. 1 Jur. (N. S.) 520; 24 L. J. (Q. B.) 159. p. 466.

Gibson v. Small, 4 H. L. Cas. 404. p. 143.

Giles v. Great Western R. Co., 36 Upper Canada Q. B. 360. pp. 270, 271.

Gilhooly v. New York etc. Steam Nav. Co., 1 Daly, 197. pp. 472, 474, 533, 534, 536.

Gillan v. Simpkin, 4 Camp. 240. p. 467.

c 13 Pa. St. 37.

Gillenwater v. Madison etc. R. Co., 5 Ind. 339. p. 48.

c 47 Iowa, 492; 30 Ill. 24; 44 Ind. 201; 58 N. Y. 134; 11 Wis. 250; 36 Mo. 434; 26 Barb. 645; 6 Am. L. Reg. 715; 22 Ind. 29; 5 Biss. 317. Gillespie v. Newburgh, 54 N. Y. 468. p. 553.

Gillis v. Pennsylvania R. Co., 59 Pa. St. 129. pp. 50, 106, 226.

c 2 Cent. L. J. 450; 35 N. J. L. 25; 59 Mo. 36; 71 Ill. 507, 509; 47 Ind. 46; 65 Pa. St. 275; 21 Minn. 213, 214; 4 Hun, 762; 67 Ill. 264; 5 Reporter, 345; 86 Pa. St. 79.

Gilshannon v. Stony Brook R. Co., 10 Cush. 228. p. 47.

c 119 Mass. 421; 28 Ind. 377; 86 Pa. St. 440; 8 Kan. 517; 53 Ga. 16; 18 N. Y. 434; 53 Pa. St. 456; 43 Me. 270; 102 Mass. 583; 49 Barb. 326; 14 Minn. 364; 38 Pa. St. 110; 10 Allen, 237, 238; 11 Kan. 93; 62 Me. 466; 6 Reporter, 126; 59 Pa. St. 246, 251; 13 Ind. 369; 28 Ind. 377; 46 Texas, 538; 17 N. Y. 156; 76 Ill. 398; 18 Ind. 230; 25 N. Y. 565; 43 Me. 270; 10 Gray, 281; 36 Mo. 433. o 9 Heisk. 868.

Ginnon v. New York etc. R. Co., 3 Robt. 25. pp. 227, 228, 267.

Gisbourne v. Hurst, 1 Salk. 249. p. 493.

Glaholm v. Barker, L. R. 5 Eq. 598; s. c. 12 Jur. (N. S.) 764; 35 L. J. (Ch.) 657; 14 Week. Rep. 1006; 14 L. T. (N. S.) 880; 11 Jur. (N. S.) 434; 34 L. J. (Ch.) 533; 13 Week. Rep. 671;

- 12 L. T. (N. S.) 317; 34 Beav. 305; L. R. 1 Ch. 223. p. 544.
 c 51 Pa. St. 322.
- Glasco v. New York etc. R. Co.*, 36 Barb. 557. pp. 434, 520, 521, 522.
 c 37 N. Y. Supr. Ct. 523, 532.
- Glassey v. Hestonville etc. R. Co.*, 57 Pa. St. 172. p. 293.
- Gleason v. Bremen*, 50 Me. 222. p. 552.
- Gleason v. Goodrich Transp. Co.*, 32 Wis. 85. pp. 510, 513, 517, 529.
 c 33 Wis. 63.
- Glover v. London etc. R. Co.*, L. R. 3 Q. B. 25. p. 516.
 c 17 Upper Canada C. P. 615.
- Goddard v. Grand Trunk R. Co.*, 57 Me. 202. pp. 304, 317, 362, 364, 365, 366, 369, 370, 575, 576, 581.
 c 44 Iowa, 318; 53 Miss. 221; 3 So. Car. 597; 3 Cliff. 428; 36 Wis. 464; 106 Mass. 189; 62 Me. 88, 90; 3 Jones & Sp. 130; 38 Ind. 127; 8 Bush, 152; 11 Nev. 363. ? 36 Wis. 676.
- Goetz v. Hannibal etc. R. Co.*, 50 Mo. 472. pp. 339, 376.
- Goff v. Great Northern R. Co.*, 30 L. J. (Q. B.) 148; s. c. 3 El. & El. 672. pp. 359, 373.
 c 42 L. J. (Q. B.) 25, 26, 27; L. R. 8 Q. B. 38, 39, 40, 41; 3 Cliff. 424; L. R. 2 Q. B. 536, 537; 46 N. Y. 29; Irish Rep. 5 C. L. 8, 10, 16, 17, 18, 19, 24, 25; 47 N. Y. 126; 12 Upper Canada C. P. 93. d L. R. 2 Q. B. 538, 539.
- Goines v. McCandless*, 4 Phila. 255. pp. 346, 377.
- Goldey v. Pennsylvania R. Co.*, 6 Casey, 248; s. c. 30 Pa. St. 342. p. 386.
 c 17 How. 368; 59 Pa. St. 250; 47 Ind. 486; 51 Pa. St. 330, 331; 39 Iowa, 254; 55 Pa. St. 59, 60, 62.
- Gonzales v. New York etc. R. Co.*, 38 N. Y. 440; s. c. 39 How. Pr. 408; 1 Jones & Sp. 57; 6 Robt. 93, 297; 1 Sweeny, 506; 50 How. Pr. 126. pp. 269, 272.
 c 66 Barb. 441; 14 Abb. Pr. (N. S.) 30, 76; 34 Iowa, 160; 54 N. Y. 471; 29 Iowa, 38; 7 Lans. 13; 42 N. Y. 473; 3 Lans. 85; 2 N. Y. S. C. (T. & C.) 646.
- Gordon v. Grand Street etc. R. Co.*, 40 Barb. 546. pp. 43, 107.
- Gordon v. Manchester etc. R. Co.*, 52 N. H. 596. pp. 65, 68.
- Gore v. Norwich etc. Transp. Co.*, 2 Daly, 254. p. 518.
 c 32 Wis. 92.
- Goshen v. Supervisors*, 1 W. Va. 308. p. 543.
- Goslin v. Corry*, 7 Man. & G. 347. p. 554.
- Gould v. Hill*, 2 Hill, 623. p. 381.
- Govett v. Radnidge*, 3 East, 62. p. 542.
- Graffam v. Boston etc. R. Co.*, 67 Me. 234. p. 522.
- Graham v. Davis*, 4 Ohio St. 362. pp. 387, 393.
- Graham v. Pacific R. Co.*, 66 Mo. 536. pp. 45, 401, 574, 575, 577, 578.
- Graham v. Toronto etc. R. Co.*, 23 Upper Canada C. P. 541. p. 49.
- Grand Rapids etc. R. Co. v. Huntley*, 38 Mich. 537. pp. 208, 221.
- Grand Rapids etc. R. Co. v. Judson*, 34 Mich. 506. p. 208.
- Grant v. Newton*, 1 E. D. Smith, 95. pp. 510, 511, 537.
 c 30 N. Y. 617; 1 Hilt. 502; 4 E. D. Smith, 180, 182, 183; 2 Bosw. 602, 604.
- Grant v. Norway*, 10 C. B. 688; s. c. 2 Eng. Law & Eq. 337. p. 176.
- Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare, 306; s. c. 7 Eng. Rail. Cas. 643; 21 L. J. (Ch.) 837; 12 Eng. Law & Eq. 224. p. 418.
- Great Northern R. Co. v. Harrison*, 10 Exch. 376; s. c. 2 Com. Law Rep. 1136; 23 L. J. (Exch.) 308; 12 C. B. 576. p. 44.
 c 34 N. J. L. 516; 34 Upper Canada Q. B. 458, 462.
- Great Northern R. Co. v. Shepherd*, 8 Exch. 30; s. c. 7 Eng. Rail. Cas. 310; 21 L. J. (Exch.) 286. pp. 511, 522, 523.
 c 73 Ill. 353; 41 Mo. 507; L. R. 6 Q. B. 619, 621; 40 L. J. (Q. B.) 303, 304; 36 Upper Canada Q. B. 355; 2 Bosw. 604; 6 Hun, 547; 10 C. B. (N. S.) 170, 172, 178; 98 Mass. 378; 1 Dakota, 359.
- Great Western R. Co. v. Blake*, 7 Hurl. & N. 987; s. c. 8 Jur. (N. S.) 1013; 31 L. J. (Exch.) 346; 10 Week. Rep. 388; 7 L. T. (N. S.) 94. pp. 412, 413,

414, 415, 416, 417, 432. (In full, p. 403.)
 e 12 Wall. 85; 35 Upper Canada Q. B. 559; L. R. 3 Q. B. 553, 554; L. R. 6 Q. B. 272, 273, 274; 40 L. J. (Q. B.) 94, 95; L. R. 5 C. P. 441, 442, 443, 444; L. R. 8 Exch. 141, 143, 144, 145; 42 L. J. (Exch.) 92, 94, 95, 96; 56 Me. 240.
Great Western R. Co. v. Braid, 1 Moo. P. C. C. (N. S.) 101; s. c. 9 Jur. (N. S.) 339; 1 Week. Rep. 444. pp. 82, 207, 211, 219. .
Great Western R. Co. v. Goodman, 12 C. B. 313; s. c. 16 Jur. 862; 21 L. J. (C. P.) 197; 11 Eng. Law & Eq. 546. pp. 514, 530.
 e 10 C. B. (N. S.) 469; 46 N. H. 226, 229.
Great Western R. Co. v. Miller, 19 Mich. 305. pp. 340, 368, 376, 377.
 e 44 Iowa, 318.
Great Western R. Co. v. Pocock, 28 Week. Rep. 49; s. c. 10 Cent. L. J. 84. (In full, p. 63.)
 e 9 Hun, 672.
Great Western R. Co. of Canada v. Fawcett, 1 Moo. P. C. C. (N. S.) 101; s. c. 9 Jur. (N. S.) 339; 11 Week. Rep. 444; 8 L. T. (N. S.) 31. p. 82.
Green v. City of Bridgeton, 9 Cent. L. J. 206. pp. 348, 377.
Green v. Milwaukee etc. R. Co., 38 Iowa, 100; s. c. 41 Iowa, 410. p. 514.
Greenland v. Chaplin, 5 Exch. 243. pp. 266, 285, 286.
 e 2 Sawyer, 29; 21 Upper Canada Q. B. 106; 18 Ohio St. 410, 411; 3 Q. B. Div. 336; 7 Cent. L. J. 14; 17 Alb. L. J. 507; 59 Ill. 352; 53 Ind. 155; 14 Allen, 298; 101 Mass. 465; 75 Ill. 98; 38 Ala. 86; 62 Me. 243. ? 4 Am. L. Reg. (N. S.) 18; 46 Pa. St. 161.
Grieve v. Ontario etc. Steamboat Co., 4 Upper Canada C. P. 387. p. 473.
 e 4 Upper Canada C. P. 543.
Griggsby v. Chappel, 5 Rich. L. 446. p. 562.
 e 53 Me. 502.
Grill v. General Iron Screw Collier Co., L. R. 1 C. P. 600. pp. 398, 574.
Grote v. Chester etc. R. Co., 2 Exch. 251; s. c. 5 Eng. Rail. Cas. 649. pp. 127, 134, 135, 156, 159, 221.
 e L. R. 4 Q. B. 389, 393; 8 Best & S. 385, 386; L. R. 2 Q. B. 424, 425; 36 L. J. (Q. B.) 187, 188;

Irish Rep. 13 C. L. 547; 15 Gratt. 237; L. R. 5 Q. B. 195, 505, 508, 512, 515.
Gunn v. Dickson, 10 Upper Canada Q. B. 461. p. 545.

H.

Hackford v. New York etc. R. Co., 6 Lans. 381; s. c. 43 How. Pr. 222. p. 553.
Hadencamp v. Second Avenue R. Co., 1 Sweeny, 490. p. 444.
Hadley v. Cross, 34 Vt. 586. p. 215.
 e 48 N. H. 315.
Hadsoll v. Stallebrass, 11 Ad. & E. 301. p. 547.
Hagan v. Providence etc. R. Co., 3 R. I. 88. p. 575.
 e 57 Me. 248. o 11 Nev. 362.
Hale v. New Jersey Steam Nav. Co., 15 Conn. 539. p. 386.
Haley v. Chicago etc. R. Co., 21 Iowa, 15. pp. 271, 302, 340, 376, 377.
 e 38 Iowa, 296; 32 Iowa, 149; 29 Iowa, 58; 36 Iowa, 40.
Hall v. Connecticut River Steamboat Co., 13 Conn. 319. pp. 205, 236, 237, 357, 558.
 e 44 Miss. 498; 3 Cliff. 422; 4 Iowa, 550; 21 Conn. 254, 578; 48 N. H. 315; 11 Gratt. 711; 2 Story, 42.
Hall v. De Cuir, 95 U. S. 485. pp. 346, 348, 349, 475.
Hall v. Hollander, 4 Barn. & Cress. 660. p. 547.
 e 25 Me. 45; 15 Ga. 356; 2 Cush. 351; 117 Mass. 544; 19 C. B. (N. S.) 236; 34 L. J. (C. P.) 296. ? 21 Wend. 617.
Hall v. Power, 12 Metc. 482. p. 350.
 e 31 Ark. 51; 59 Pa. St. 141; 15 N. Y. 463.
Halpin v. Third Avenue R. Co., 8 Jones & Sp. 175. pp. 444, 562.
Hambleton v. Veere, 2 Saund. 169. p. 564.
Hamilton v. New York etc. R. Co., 51 N. Y. 100. pp. 70, 377.
 e 47 Iowa, 86; 10 Ch. Leg. N. 78; 6 Reporter, 4; 48 Vt. 235.
Hamilton v. Third Avenue R. Co., 53 N. Y. 25; s. c. 48 How. Pr. 50; 3 Jones & Sp. 118. pp. 338, 571, 575, 579.
 e 45 Iowa, 573; 4 Hun, 59, 219, 684; 1 Nev. 311; 67 N. Y. 56; 6 Thomp. & C. 498. d 48 Vt. 235.

- Hamlin v. Great Northern R. Co., 1 Hurl. & N. 408; s. c. 2 Jur. (N. s.) 1122; 26 L. J. (Exch.) 20. pp. 546, 568.
 e 1 C. P. Div. 302, 313, 323, 325; 42 Wis. 29; 9 Ch. Leg. N. 316. d 44 L. J. (Q. B.) 51, 52, 53; L. R. 10 Q. B. 116, 120.
- Hammond v. North-Eastern R. Co., 6 So. Car. 130. pp. 45, 545.
- Hando v. London etc. R. Co., Q. B., May 6, 1867. p. 147.
- Hanley v. Harlem R. Co., 1 Edm. Sel. Cas. 359. pp. 26, 219.
- Hanna (The), 36 L. J. (Adm.) 1; s. c. 15 Week. Rep. 263; L. R. 1 Adm. 283; 15 L. T. (N. s.) 334. p. 463.
- Hannibal etc. R. Co. v. Swift, 12 Wall. 262; s. c. 11 Am. L. Reg. (N. s.) 126; 4 Ch. Leg. N. 99. pp. 28, 507, 513, 518, 520, 521.
 e 52 N. Y. 433; 67 N. Y. 212; 1 Dakota, 358.
- Hanson v. European etc. R. Co., 62 Me. 84. pp. 366, 576, 581.
 e 11 Nev. 364.
- Harlow v. Fitchburg R. Co., 8 Gray, 237. pp. 536, 539.
- Harlow v. Humiston, 6 Cow. 191. p. 551.
 e 18 N. Y. 251; 33 Barb. 416; 23 Wend. 447, 452; 20 Ill. 490; 55 Barb. 246; 5 Duer, 25; 25 Me. 47; 12 Pick. 177; 24 N. J. L. 269, 284; 2 Hilt. 38; 6 Iowa, 452; 8 Nev. 114; 21 Barb. 79; 40 Barb. 382; 29 Me. 309; 4 Barb. 338; 7 Bosw. 135.
- Harper v. Erie R. Co., 32 N. J. L. 88. pp. 226, 268.
- Harris v. Costar, 1 Car. & P. 636. pp. 116, 120, 236, 238, 550.
 e 21 Md. 296; 2 C. B. 891; 3 Dow. & L. 797; 10 Jur. 437; 15 L. J. (C. P.) 185.
- Harris v. Great Western R. Co., 1 Q. B. Div. 515. p. 519.
 e 2 C. P. Div. 420, 421.
- Harris v. Packwood, 3 Taun. 272. pp. 493, 497, 499.
- Harris v. Stevens, 31 Vt. 79. pp. 106, 350, 377.
 e 59 Pa. St. 141; 31 Ark. 51, 52.
- Harrold v. Great Western R. Co., 14 L. T. (N. s.) 440. pp. 232, 268.
 e L. R. 4 Exch. 124.
- Hart v. Rensselaer R. Co., 8 N. Y. 37. pp. 429, 432.
- Hathaway v. Toledo etc. R. Co., 46 Ind. 25. p. 552.
 e 52 Ind. 111; 47 Ind. 456; 49 Ind. 97.
- Havens v. Hartford etc. R. Co., 28 Conn. 69. p. 545.
- Hawcroft v. Great Northern R. Co., 21 L. J. (Q. B.) 178; s. c. 16 Jur. 196; 8 Eng. Law & Eq. 362. pp. 29, 65, 69. (In full, p. 53.)
 e 27 Ind. 61. ? 52 N. H. 602.
- Hawkins v. Great Western R. Co., 17 Mich. 57; s. c. 18 Mich. 427. p. 386.
- Hawkins v. Hoffman, 6 Hill, 586. pp. 411, 511, 513, 521.
 e 57 N. Y. 557; 15 Mich. 127; 30 N. Y. 615; 4 Bosw. 234; 35 Vt. 622; 3 Barb. 389; 9 Humph. 624; 15 Mich. 142; 49 N. Y. 78; 24 La. An. 573; 45 Barb. 223; 14 Allen, 459; 10 Cush. 418; 6 Hun, 547; 98 Mass. 84; 2 Bosw. 64; 44 N. H. 330, 331; 14 Pa. St. 133; 6 Ind. 247; 10 How. Pr. 332; 2 Duer, 341; 13 Ill. 748, 749, 750; 1 E. D. Smith, 99; 6 Cush. 72; 37 N. Y. Superior Ct. 528; 6 Hill, 590; 25 Ga. 64; 7 Am. L. Reg. (N. s.) 538; 6 Blatchf. 69; 1 Hilt. 502. ? 30 N. Y. 610.
- Hay v. Great Western R. Co., 37 Upper Canada Q. B. 456. p. 266.
- Hay v. Le Neve, 2 Shaw's Sc. App. 405. p. 285.
- Haycroft v. Lake Shore etc. R. Co., 64 N. Y. 636. p. 562.
 e 7 Hun, 556.
- Hays v. Gallagher, 72 Pa. St. 136. p. 552.
- Hazard v. Chicago etc. R. Co., 1 Biss. 503. pp. 228, 234, 267, 343.
 e 59 Ind. 323.
- Healey v. City Passenger R. Co., 28 Ohio St. 23. pp. 370, 375, 443.
- Healy v. New York, 3 Hun, 708. p. 271.
- Heard v. Mountain, 5 Petersd. 54. p. 236.
- Hegeman v. Western R. Corp., 16 Barb. 353; 13 N. Y. 9. pp. 191, 200, 209, 215, 216, 221, 222, 356, 563. (In full, p. 160.)
 e 44 N. Y. 481, 487; 3 Cliff. 421; 3 Park. Cr. Cas. 237; 15 N. Y. 411; 34 Barb. 274; 11 Allen, 316; 25 N. Y. 445; 34 N. Y. 408; 48 N. H. 314, 315; 24 N. Y. 219; 18 N. Y. 588; 47 N. Y. 287; 32 Barb. 659; 9 Rich. L. 89; 51 N. Y. 502; 63 Barb. 266. d 26 N. Y. 103.

- Heirn v. McCaughan, 32 Miss. 17. pp. 65, 66, 67, 544, 546, 551, 568, 574.
- Hellman v. Holladay, 1 Woolw. 365. pp. 511, 512, 522, 523.
- Henderson v. Stevenson, 32 L. T. (N. s.) 709; s. c. L. R. 2 Sc. App. 470. pp. 65, 437, 527. 
 d 1 C. P. Div. 626; 2 C. P. Div. 421, 429; L. R. 1 Q. B. 521, 522, 528, 530, 531, 532; 2 Q. B. 421, 429.
- Hendricks v. Sixth Avenue R. Co., 12 Jones & Sp. 8. pp. 303, 304.
- Herman v. Drinkwater, 1 Me. 27. p. 538.
 e 11 Humph. 421; 1 Hilt. 282.
- Hestonville etc. R. Co. v. Connell, 6 W. N. C. 514; s. c. 8 Cent. L. J. 306. p. 442.
- Hewett v. Swift, 3 Allen, 423. pp. 362, 370, 375.
- Hey v. Philadelphia, 81 Pa. St. 44. p. 220.
- Hibbard v. New York etc. R. Co., 15 N. Y. 455. pp. 30, 43, 335, 336, 340, 375.
 e 7 Hun, 144; 28 Barb. 279, 283; 36 Con. 291; 95 U. S. 502; 28 Conn. 89; 46 N. H. 223; 57 Me. 235, 241; 31 N. J. L. 393; 37 Mich. 346; 47 N. Y. 126; 55 Ind. 372. d 46 N. Y. 29.
- Hickey v. Boston etc. R. Co., 14 Allen, 429. pp. 252, 260, 262, 551.
 e 16 Am L. Reg. 666; 121 Mass. 423; 6 Cent. L. J. 47; 49 N. Y. 53; 95 U. S. 443. d 104 Mass. 141.
- Hicks v. Pacific R. Co., 65 Mo. 34. p. 552.
 e 65 Mo. 23, 24, 26; 6 Cent. L. J. 230.
- Hickox v. Naugatuck R. Co., 31 Conn. 281. pp. 511, 514.
 e 9 Hun, 672; 1 Dakota, 360.
- Hide v. Proprietors, etc., 1 Esp. 36. pp. 494, 495.
- Higgins v. Hannibal etc. R. Co., 36 Mo. 418. pp. 49, 263.
 e 42 Mo. 85; 8 Kan. 517.
- Higgins v. Harlem etc. R. Co., 2 Bosw. 132. p. 261.
- Higgins v. Watervliet Turnpike Co., 46 N. Y. 23. pp. 301, 317, 367, 374, 375, 443.
 e 70 N. Y. 591; 36 Wis. 464; 62 N. Y. 185; 5 Daly, 223, 224; 64 N. Y. 133; 56 N. Y. 199; 3 Jones & Sp. 123; 53 N. Y. 28; 47 N. Y. 125, 277; 49 N. Y. 314.
- Highland Light (The), Chase's Dec. 151. p. 480, 482.
- Hill v. New Haven, 37 Vt. 501. p. 553.
- Hill v. New Orleans etc. R. Co., 11 La. An. 292. pp. 267, 559, 575.
 e 57 Me. 253; 23 La. An. 464.
- Hill v. Syracuse etc. R. Co., 63 N. Y. 101. pp. 70, 71, 376.
 e 7 Hun, 144.
- Hilliard v. Goold, 34 N. H. 240. pp. 329, 341, 376.
 e 46 N. H. 223; 33 Iowa, 567; 53 Me. 233; 15 N. Y. Sup. Ct. 580; 53 Me. 192; 43 Ill. 423; 7 Iowa, 209.
- Hinckley v. Cape Cod R. Co., 120 Mass. 257. p. 551.
- Hinton v. Dibbin, 2 Q. B. 646. pp. 178, 389, 398.
- Hirschsohn v. Hamburgh etc. Packet Co., 2 Jones & Sp. 521. pp. 472, 511, 512, 521.
- Hobbs v. London etc. R. Co., 23 Week. Rep. 520; s. c. 44 L. J. (Q. B.) 49; L. R. 10 Q. B. 111; 32 L. T. (N. s.) 352. pp. 65, 67, 565, 566, 571.
 e 1 C. P. Div. 303; 42 Wis. 29; 9 Ch. Leg. N. 316; 4 Col. 348.
- Hoffbauer v. D. & N. R. Co., 20 Alb. L. J. 474. p. 340.
- Holbrook v. Utica etc. R. Co., 16 Barb. 113; s. c. 12 N. Y. 534. pp. 166, 193, 196, 211, 212, 214, 257, 553.
 e 3 Park Cr. Cas. 237; 6 Gray, 70; 34 Barb. 269; 5 Bush, 7; 44 Ind. 204; 37 Mo. 260; 7 Bosw. 135; 18 N. Y. 252, 540, 544; 32 Barb. 659; 3 E. D. Smith, 333; 35 Barb. 199; 29 Ind. 86; 16 Barb. 356. ? 39 Md. 345.
- Holder v. Soulby, 8 C. B. (N. s.) 254; s. c. 29 L. J. (C. P.) 246; 6 Jur. (N. s.) 1031; 8 Week. Rep. 438. p. 531.
- Holdridge v. Utica etc. R. Co., 56 Barb. 191. p. 534.
- Holley v. Winooski Turnpike Co., 1 Aik. 74. p. 220.
- Hollister v. Nowlen, 19 Wend. 234. pp. 4, 5, 26, 114, 122, 236, 526. (In full, p. 489.)
 e 15 Mich. 137, 140; 30 N. Y. 615; 1 Daly, 153, 199; 4 Bosw. 233; 10 N. H. 486, 488; 11 Cush. 99; 25 N. Y. 461; 34 N. Y. 551; 21 Wend. 361; 29 Wend. 49; 19 Wend. 254, 257; 49 Barb. 155; 11

N. Y. 490; 14 Barb. 526; 46 N. H. 228; 16 Barb. 116; 98 Mass. 378; 1 E. D. Smith, 99; 9 Mete. 13; 51 Barb. 78; 3 Hill, 20; 7 Hill, 563; 2 Daly, 121; 10 Ch. Leg. N. 9, 10; 16 Pa. St. 78; 45 Barb. 219; 1 Abb. Adm. 359; 66 Ill. 477; 29 Ga. 539; 23 Vt. 205; 16 Vt. 61; 23 N. H. 285; 4 Sandf. S. C. 140, 144; 2 Ohio St. 136.

Holly v. Atlanta Street R. Co., 7 Reporter, 460. pp. 304, 364, 442.

Holly v. Boston Gas Co., 8 Gray, 123. p. 292.

Holmes v. Doane, 3 Gray, 328. p. 464.

Holmes v. North-Eastern R. Co., L. R. 4 Exch. 254; s. c. 38 L. J. (Exch.) 161; 17 Week. Rep. 800; 20 L. T. (N. s.) 616 (affirmed in the Exchequer Chamber, L. R. 6 Exch. 123; 40 L. J. (Exch.) 121). pp. 106, 226.

c 62 Me. 562; 35 N. J. L. 25; 59 Mo. 36; 47 Ind. 48; 25 Mich. 9; 1 Q. B. Div. 253, 254, 255; L. R. 10 Q. B. 301; 6 Reporter, 752.

Holmes v. Wakefield, 12 Allen, 580. pp. 370, 374, 375.

c 64 N. Y. 138; 104 Mass. 120, 121; 38 Ind. 126; 5 N. Y. S. C. (T. & C.) 480; 3 Hun, 334; 7 Reporter, 753.

Holyoke v. Grand Trunk R. Co., 48 N. H. 541. pp. 551, 561, 564.

c 11 Nev. 369.

Hood v. New York etc. R. Co., 22 Conn. 1. pp. 433, 434.

c 56 Me. 240; 22 N. Y. 304; 3 Daly, 396; 29 Vt. 426; 23 Conn. 474, 475, 485; 31 Cal. 52; 29 Barb. 54; 24 N. Y. 277; 33 Conn. 179; 45 Mo. 241. ? 22 N. Y. 278; 24 Ill. 338, 339; 47 Mo. 590.

Hopkins v. Atlantic etc. R. Co., 36 N. H. 1. pp. 564, 565, 572, 573, 574.

c 57 Me. 255, 257; 11 Nev. 364; 48 N. H. 318, 320, 455; 19 Ohio St. 172.

Hopkins v. Westcott, 6 Blatchf. 54; s. c. 7 Am. L. Reg. (N. s.) 533. pp. 513, 528.

c 32 Wis. 99; 4 Cent. L. J. 38; 93 U. S. 188; 15 Hals. L. J. 192. d 43 N. Y. 268.

Houfe v. Fulton, 29 Wis. 296. p. 294.

Houston etc. R. Co. v. Gorbett, 49 Texas, 473. pp. 208, 227, 241.

Houston etc. R. Co. v. Moore, 49 Texas, 31. pp. 52, 343, 345.

Howard v. Cobb, 19 Law Reporter, 377. pp. 65, 66.

Howe v. Newmarch, 12 Allen, 55. p. 363.

c 50 Mo. 121; 114 Mass. 519; 5 N. Y. S. C.

(T. & C.) 483; 3 Hun, 337; 53 Ind. 339; 57 Me. 214; 104 Mass. 120; 38 Ind. 126; 3 Cliff. 429; 106 Mass. 188.

Howe v. Plainfield, 41 N. H. 135. p. 557.

Hoyt v. Hudson, 41 Wis. 105. p. 552. c 43 Wis. 524, 675; 6 Cent. L. J. 429; 41 Wis. 148; 7 Reporter, 83, 84.

Howland v. The Lavinia, 1 Pet. Adm. 123. p. 467.

Hubener v. New Orleans etc. R. Co., 23 La. An. 492. pp. 226, 267.

Hudston v. Midland R. Co., L. R. 4 Q. B. 366; s. c. 10 Best & S. 504. p. 512.

c L. R. 6 Q. B. 621, 622; 40 L. J. (Q. B.) 304; 6 Hun, 547.

Huelsenkamp v. Citizens' R. Co., 34 Mo. 54; s. c. 37 Mo. 537. pp. 245, 444.

c 40 Mo. 518; 20 Minn. 135. ? 52 Me. 529.

Hulbert v. New York etc. R. Co., 40 N. Y. 145. pp. 51, 107, 108, 269.

c 10 Jones & Sp. 161; 28 Mich. 454.

Hull v. Kansas City, 54 Mo. 598. p. 220.

Hull v. Richmond, 2 Woodb. & M. 337. p. 553.

Hunt v. Pownall, 3 Vt. 411. p. 220.

Hunt v. Wynn, 6 Watts, 47. p. 542.

Hunter v. Stewart, 47 Me. 419. p. 551.

Huntsman v. Great Western R. Co., 20 Upper Canada Q. B. 24. p. 579.

c 20 Upper Canada Q. B. 30.

Hurst v. Great Western R. Co., 19 C. B. (N. s.) 310; s. c. 34 L. J. (C. P.) 264; 11 Jur. (N. s.) 730; 13 Week. Rep. 950; 12 L. T. (N. s.) 634. pp. 29, 67.

c 24 Upper Canada Q. B. 519; 52 N. H. 605.

Hurt v. Southern R. Co., 40 Miss. 391. p. 43.

Hutchings v. Western etc. R. Co., 25 Ga. 61. pp. 510, 511, 521, 524.

Hutchinson v. York etc. R. Co., 5 Exch. 343; s. c. 14 Jur. 837; 6 Eng. Rail. Cas. 580; 19 L. J. (Exch.) 296. p. 48.

c 6 Cush. 77; 4 Jur. (N. s.) 767, 769, 771, 773; 2 Lans. 512; 7 La. An. 324, 327; 18 C. B. 803; L. R. 1 C. P. 296; 43 Me. 270; 3 Ohio St. 211; 24 Ala. 36; 5 N. Y. 496; 53 N. Y. 552; 14 Minn. 362; 23 Pa. St. 386; 22 Ala. 809, 312; 43 Me. 270;

11 Exch. 838; 5 Hun, 33; 6 Cal. 210; 6 La. An. 498; 21 Ill. 26; 9 Cush. 114; 51 Miss. 642; 10 Mich. 199; 76 Ill. 397; 25 N. Y. 565; 4 Jur. (N. s.) 773; 10 Mich. 199; 1 Am. L. Reg. 719, 720; 5 Best & S. 57; 33 L. J. (Q. B.) 262, 264, 265, 266; 10 Jur. (N. s.) 1076, 1077; 3 Exch. Div. 343; 5 Exch. 357, 358; 14 Jur. 841; 19 L. J. (Exch.) 302; 109 Mass. 449; 49 Miss. 283, 287; 23 Vt. 63; 17 Ohio St. 210; 6 Jones L. 246; 46 Texas, 538; 15 Ga. 358; 1 Hurl. & N. 250; 2 Jur. (N. s.) 956; 25 L. J. (Exch.) 193.
Hutton v. Osborn, 1 Selw. N. P. (10th ed.) 399, note *b*; p. 452.
Hyde v. Jamaica, 27 Vt. 443. p. 553.
 c 21 Mich. 113; 36 Vt. 587; 29 Conn. 209; 36 N. H. 298; 122 Mass. 351; 29 Iowa, 90; 42 Ind. 343; 30 Vt. 740; 34 Conn. 13; 8 Minn. 166.
Hynds v. Hays, 25 Ind. 31. p. 558.

I.

Illinois etc. R. Co. v. Able, 59 Ill. 131; s. c. 4 Ch. Leg. N. 176. pp. 227, 267.
 c 30 Ohio St. 240.
Illinois etc. R. Co. v. Adams, 42 Ill. 474. p. 386.
Illinois etc. R. Co. v. Copeland, 24 Ill. 332. pp. 421, 432, 511, 536, 537, 549, 583.
 c 1 McArthur, 494; 21 Wis. 587; 42 Ill. 95; 84 Ill. 241. ? 51 Miss. 226.
Illinois etc. R. Co. v. Cunningham, 67 Ill. 316. p. 580.
Illinois etc. R. Co. v. Demars, 44 Ill. 292. p. 570.
Illinois etc. R. Co. v. Finnegan, 21 Ill. 646. p. 418.
 c 41 Wis. 73; 65 Ill. 369.
Illinois etc. R. Co. v. Godfrey, 71 Ill. 500. pp. 105, 106.
 c 72 Ill. 570; 83 Ill. 514, 515; 81 Ill. 596; 71 Ill. 642; 2 Bradw. 313.
Illinois etc. R. Co. v. Hammer, 72 Ill. 347. p. 105.
 c 2 Bradw. 310.
Illinois etc. R. Co. v. Hetherington, 83 Ill. 510. p. 233.
 c 2 Bradw. 40, 310, 433.
Illinois etc. R. Co. v. Johnson, 67 Ill. 312. pp. 343, 580.
 c 83 Ill. 280; 67 Ill. 316.
Illinois etc. R. Co. v. Kanouse, 39 Ill. 272. p. 417.
 c 10 Jones & Sp. 234; 63 N. Y. 531; 40 Ill. 145; 63 Ill. 546; 86 Ill. 445; 20 Kan. 518.

Illinois etc. R. Co. v. Nelson, 59 Ill. 110. pp. 343, 570.
 c 83 Ill. 280.
Illinois etc. R. Co. v. Phillips, 49 Ill. 234. p. 222.
Illinois etc. R. Co. v. Read, 37 Ill. 484. p. 402.
 c 83 Ill. 280; 34 N. J. L. 516; 85 Ill. 84; 2 Cent. L. J. 367; 20 Minn. 129, 130.
Illinois etc. R. Co. v. Slatton, 54 Ill. 133. p. 267.
 c 78 Ill. 94; 3 Cent. L. J. 416.
Illinois etc. R. Co. v. Sutton, 42 Ill. 438. pp. 342, 343, 557.
 c 59 Ind. 323; 63 Ill. 307; 67 Ill. 315; 38 Ind. 125. d 64 Mo. 475.
Illinois etc. R. Co. v. Taylor, 24 Ill. 323. p. 538.
 c 24 Ill. 336.
Illinois etc. R. Co. v. Whittemore, 43 Ill. 420. pp. 336, 375.
 c 55 Ill. 188.
Imhoff v. Chicago etc. R. Co., 20 Wis. 344. pp. 226, 446.
Ince v. East Boston Co., 106 Mass. 149. p. 251.
 c 41 Iowa, 231; 95 U. S. 442; 6 Cent. L. J. 46.
Indiana etc. R. Co. v. Hudelson, 13 Ind. 325. p. 105.
 c 17 Ind. 105; 15 Ind. 122.
Indiana etc. R. Co. v. Mundy, 21 Ind. 48. pp. 399, 402.
 c 47 Ind. 492; 34 N. J. L. 516; 22 Ind. 28, 29; 20 Minn. 129; 2 Cent. L. J. 367. o 47 Ind. 482.
Indianapolis etc. R. Co. v. Allen, 31 Ind. 394. p. 389.
Indianapolis etc. R. Co. v. Anthony, 43 Ind. 183. pp. 369, 370, 549, 562.
 c 51 Ind. 248, 251; 36 Wis. 675.
Indianapolis etc. R. Co. v. Beaver, 41 Ind. 493. pp. 45, 234, 399.
 c 47 Ind. 493, 495; 59 Ind. 322, 323.
Indianapolis etc. R. Co. v. Birney, 71 Ill. 391. pp. 65, 565, 570.
Indianapolis etc. R. Co. v. Hamilton, 44 Ind. 76. p. 549.
 c 47 Ind. 371; 51 Ind. 248.
Indianapolis etc. R. Co. v. Horst, 93 U. S. 291; s. c. 15 Alb. L. J. 61; 16 Am. L. Reg. (N. s.) 317. pp. 104, 234, 266.
Indianapolis etc. R. Co. v. Keely's

- Administrator, 23 Ind. 133. pp. 549, 552.
 c 34 Iowa, 161; 24 Ind. 412; 35 Ind. 466; 42 Ind. 342; 29 Gratt. 479; 50 Ind. 68, 84; 26 Ind. 444; 38 N. J. L. 139; 47 Ind. 478, 479.
 Indianapolis etc. R. Co. v. Milligan, 50 Ind. 392. pp. 375, 551, 577, 585.
 Indianapolis etc. R. Co. v. Rinard, 46 Ind. 293. pp. 28, 341, 343, 376.
 c 51 Ind. 574.
 Indianapolis etc. R. Co. v. Rutherford, 29 Ind. 82. p. 257.
 c 5 Bush, 7; 39 Md. 350.
Ingalls v. Bills, 9 Metc. 1. pp. 131, 139, 147, 158, 167, 170, 174, 191, 199, 266, 355, 410. (In full, p. 112.)
 c 24 Ga. 366; 8 Best & S. 380, 393, 403; 36 L. J. (Q. B.) 185, 191, 195; L. R. 2 Q. B. 419, 430, 435, 439; 15 Mich. 140; 38 Miss. 275; 3 Cliff. 420; 21 Md. 283, 301; 119 Mass. 413; 15 N. Y. 411; 44 Ind. 201; 4 Iowa, 548; 97 Mass. 368; 2 Mont. 522, 526; 18 N. Y. 538; 1 Duer, 241; 19 Ill. 517; 41 N. H. 51; 32 Barb. 659; 19 Wend. 269; 48 N. H. 315; 34 Vt. 588; 13 N. Y. 30; 15 Ill. 471; 16 Barb. 116, 357; 11 Allen, 505; 37 Mo. 546; 11 Gratt. 715, 716. d 13 N. Y. 25; 3 E. D. Smith, 334. ? 15 Ill. 468.
 Insurance Co. v. Folsom, 18 Wall. 249. p. 509.
 Ionic (The), 5 Blatchf. 538. pp. 511, 512.
 Irwin v. Sprigg, 6 Gill, 200. p. 552.
 c 30 Ala. 327.
 Isaacs v. Third Avenue R. Co., 47 N. Y. 122. pp. 336, 443.
 c 5 Daly, 222; 44 Iowa, 318. d 6 Daly, 224; 62 N. Y. 184, 185.
 Isabel v. Hannibal etc. R. Co., 60 Mo. 475. p. 293.
 Israel v. Clark, 4 Esp. 359; s. c. 1 Stark. 423. pp. 115, 117, 118, 130, 145, 155, 199, 236, 237, 242.
 c 48 N. H. 313; 8 Best & S. 379, 390, 400; L. R. 2 Q. B. 419, 437; 36 L. J. (Q. B.) 185, 190, 194. d 9 Metc. 7, 8. ? L. R. 4 Q. B. 383.
- J.
- Jackson v. Indianapolis etc. R. Co., 47 Ind. 454. p. 552.
 c 58 Ind. 28.
 Jackson v. Second Avenue R. Co., 47 N. Y. 274. pp. 374, 563, 576.
 c 70 N. Y. 591; 13 Hun, 74; 62 N. Y. 185; 64 N. Y. 138; 5 Daly, 223.
 Jackson v. Tollett, 2 Stark. 37. pp. 114, 200, 237, 240.
 c 11 Gratt. 711.
 Jacob v. United States, 1 Brocken. 520. p. 482.
 Jacobus v. St. Paul etc. R. Co., 20 Minn. 125; s. c. 1 Cent. L. J. 371. pp. 44, 262, 399, 400.
 c 37 Mich. 115; 2 Cent. L. J. 367.
 James D. Parker (The), 23 Int. Rev. Rec. 66. p. 482.
 James v. Patten, 6 N. Y. 9. p. 486.
 Jefferson Ins. Co. v. Cotheal, 7 Wend. 78. p. 559.
 Jeffersonville etc. R. Co. v. Hendricks, Admr., 26 Ind. 228. pp. 199, 227, 228, 267, 547, 552, 553.
 c 44 Miss. 487; 51 Ind. 44; 47 Ind. 497; 44 Ind. 201.
 Jeffersonville etc. R. Co. v. Parmalee, 51 Ind. 42. p. 227.
 Jeffersonville etc. R. Co. v. Riley, 39 Ind. 569. pp. 51, 110.
 Jeffersonville etc. R. Co. v. Rogers, 38 Ind. 116. pp. 341, 342, 369, 549, 576.
 c 45 Iowa, 572; 51 Ind. 248; 36 Wis. 675; 15 Minn. 56; 57 Me. 254; 46 Ind. 295. d 51 Ind. 572. ? 36 Wis. 676.
 Jeffersonville etc. R. Co. v. Swift, 26 Ind. 459. p. 267.
 Jeffersonville etc. R. Co. v. Vancant, 40 Ind. 233. p. 547.
Jencks v. Coleman, 2 Sumn. 221. pp. 4, 7, 19, 26, 29, 314, 317, 351, 377, 453, 464, 465. (In full, p. 11.)
 c 15 Mich. 131; 4 Wall. 615; 67 N. Y. 303; 5 Ch. Leg. N. 535; 36 Wis. 459, 460, 463; 10 N. H. 486; 29 Vt. 163; 31 How. Pr. 277; 7 Metc. 601; 1 Am. Rail. Cas. 394; 24 N. J. L. 442; 11 Blatchf. 235; 18 Int. Rev. Rec. 55; 15 Ill. 472; 95 U. S. 503.
 Jenkins v. Little Miami R. Co., 2 Disney, 49. p. 563.
 c 41 Ind. 254.
 Jennings v. Great Northern R. Co., 35 L. J. (Q. B.) 15; s. c. 12 Jur. (N. S.) 331; L. R. 1 Q. B. 7; 44 Week. Rep. 28; 13 L. T. (N. S.) 231. p. 339.
 c L. R. 1 Q. B. 15; 76 Pa. St. 74.
 Jerome v. Smith, 48 Vt. 230. pp. 338, 339, 376, 556.

John v. Bacon, L. R. 5 C. P. 441. pp. 412, 413, 472, 473.
 c L. R. 8 Exch. 147; 42 L. J. (Exch.) 97; 25 Mich. 9.
Johnson v. Concord R. Co., 46 N. H. 213. pp. 65, 70, 71, 377.
 c 67 Me. 165; 17 Alb. L. J. 367; 6 Cent. L. J. 382; 50 Ind. 144; 2 Cent. L. J. 830; 6 Reporter, 490; 71 Pa. St. 436, 437; 55 Ind. 372.
Johnson v. Hudson River R. Co., 20 N. Y. 65; s. c. 6 Duer, 633; 5 Duer, 21. pp. 551, 553.
Johnson v. Midland R. Co., 4 Exch. 367. p. 55.
Johnson v. Stone, 11 Humph. 419. p. 511.
 c 15 Mich. 127; 30 N. Y. 612; 41 Miss. 678; 10 How. Pr. 333; 1 Hilt. 282.
Johnson v. Wells, 6 Nev. 222. pp. 571, 572.
 c 44 Iowa, 323; 11 Nev. 369, 370, 375, 376.
Johnson v. West Chester etc. R. Co., 70 Pa. St. 357. pp. 226, 268, 434.
 c 50 Ohio St. 240.
Joliet v. Verley, 35 Ill. 58. p. 220.
Jones v. Boyce, 1 Stark. 493. pp. 124, 236, 237, 261, 266. (In full, p. 246.)
 c L. R. 4 C. P. 743; 44 L. J. (Q. B.) 114; L. R. 10 Q. B. 274; 13 Pet. 193; 15 Ill. 471; 9 Metc. 13; 14 Allen, 486.
Jones v. Bright, 5 Bing. 533. p. 130.
Jones v. Norwich etc. Transp. Co., 50 Barb. 193. pp. 534, 535, 536.
Jones v. Voorhees, 10 Ohio, 145; s. c. 10 Am. L. Reg. 145. pp. 387, 512, 526.
 c 30 N. Y. 612; 17 How. 369; 47 Ind. 486; 8 Bush, 475; 10 How. Pr. 332; 10 Ohio St. 70; 13 Ill. 750; 6 Cush. 72; 39 Iowa, 249; 2 Ohio St. 135.
Jones v. Yeager, 2 Dill. 64. p. 222.
Jordan v. Fall River R. Co., 5 Cush. pp. 511, 512, 526.
 c 15 Mich. 127; 30 N. Y. 612, 617, 621; 73 Ill. 357; 41 Miss. 678; 35 Vt. 612; 55 Me. 532; 98 Mass. 84; 44 N. H. 331; 6 Ind. 247; 106 Mass. 148; 10 How. Pr. 333; 10 Cush. 507; 9 Hun, 671; 31 Conn. 283; 22 Iowa, 171; 29 Ind. 361; 46 N. H. 226; 98 Mass. 376; 27 Vt. 113.
Julien v. Str. Wade Hampton, 27 La. An. 377. p. 472.

K.

Kansas etc. R. Co. v. Kessler, 18 Kan. 523. pp. 343, 344, 575.

Kansas etc. R. Co. v. Miller, 2 Col. 442. pp. 208, 214, 560, 561.
Kansas etc. R. Co. v. Pointer, 14 Kan. 37; s. c. 9 Kan. 620. p. 552.
 c 19 Kan. 493, 495.
Kansas Pacific R. Co. v. Montelle, 10 Kan. 119. pp. 435, 514.
Kansas Pacific R. Co. v. Salmon, 11 Kan. 83. p. 49.
 c 19 Kan. 272, 493; 6 Reporter, 200.
Kay v. Pennsylvania R. Co., 63 Pa. St. 269. p. 293.
Kearney v. King, 2 Barn. & Ald. 301. p. 457.
Keating v. New York etc. R. Co., 3 Lans. 469; s. c. 49 N. Y. 673. p. 226.
 c 28 Mich. 454.
Keegan v. Western R. Corp., 8 N. Y. 175. p. 222.
Keeley v. Boston etc. R. Co., 67 Me. 163; s. c. 17 Alb. L. J. 366; 6 Cent. L. J. 382. pp. 71, 359, 376.
Keene v. Lizardi, 5 La. 431. pp. 361, 362, 470.
 c 27 La. An. 5, 12; 3 Cliff. 427, 428.
Keene v. The Whistler, 2 Sawyer, 348. p. 485.
Keith v. Pinkham, 43 Me. 501. pp. 199, 241, 259, 265.
 c 49 Me. 281; 20 Minn. 135.
Keller v. New York etc. R. Co., 24 How. Pr. 274. pp. 226, 234, 270.
Kelsey v. Glover, 15 Vt. 708. p. 220.
Kemp v. Coughtry, 11 Johns. 107. p. 492.
Kennard v. Burton, 25 Me. 39. pp. 546, 552.
 c 13 Ill. 588; 19 Conn. 576; 18 N. Y. 252; 28 Mich. 45; 40 Me. 65; 2 Woodb. & M. 345; 32 Me. 52; 12 Metc. 420; 30 Me. 179; 29 Me. 310.
Kennedy v. North Missouri R. Co., 36 Mo. 351. p. 245.
Kennedy v. Shea, 110 Mass. 147. p. 547.
Kenrig v. Eggleston, Aleyn, 93. pp. 497, 499.
Kent v. Midland R. Co., L. R. 10 Q. B. 1; s. c. 31 L. T. (N. s.) 430; 23 Week. Rep. 25; 44 L. J. (Q. B.) 18. pp. 432, 437, 532, 534.

Kentucky etc. R. Co. v. Dills, 4 Bush, 593. pp. 267, 575.
 e 59 Ind. 320.

Keokuk Packet Co. v. Henry, 50 Ill. 264. pp. 43, 50.

Keokuk Packet Co. v. True, 88 Ill. 608. pp. 51, 472, 474.

Kepperly v. Ramsden, 83 Ill. 354. p. 552.

Ker v. Mountain, 1 Esp. 27. pp. 68, 237.

Kerr v. Grand Trunk R. Co., 24 Upper Canada C. P. 209. p. 515.

Kessler v. New York etc. R. Co., 1 Abb. N. C. 549; s. c. 61 N. Y. 538; 7 Lans. 62. pp. 434, 435, 515.

Kimball v. Rutland etc. R. Co., 26 Vt. 247. p. 386.

King v. Franklin, 1 Fost. & Fin. 360. pp. 365, 470.

Kinney v. Central R. Co., 32 N. J. L. 407; s. c. 34 N. J. L. 513. pp. 44, 386, 400, 402.
 e 17 How. 367; 2 Cent. L. J. 367. o 47 Ind. 485; 20 Minn. 129.

Kinney v. Neil, 1 McLean, 540. p. 556.

Kinsley v. Lake Shore etc. R. Co., 125 Mass. 54; s. c. 19 Alb. L. J. 113. pp. 369, 370, 517, 518, 520.

Kisten v. Hildebrand, 9 B. Mon. 72. p. 531.

Klein v. Hamburg American Packet Co., 3 Daly, 390. p. 533.

Klein v. Jewett, 26 N. J. Eq. 474. pp. 233, 269, 564, 571, 572.

Kline v. Central Pacific R. Co., 37 Cal. 400; s. c. 39 Cal. 587. p. 375.
 e 57 Me. 255; 40 Cal. 19; 5 N. Y. S. C. (T. & C.) 480; 3 Hun, 334; 48 Miss. 117, 118, 123.

Knapp v. Dagg, 18 How. Pr. 165. p. 294.

Knight v. Pontchartrain R. Co., 23 La. An. 462. pp. 226, 267.

Knight v. Portland etc. R. Co., 56 Me. 234. pp. 107, 108, 109, 269, 433.
 e 59 Me. 187; 39 Ind. 586.

Knowlton v. Erie R. Co., 19 Ohio St. 260. pp. 387, 399, 400.
 e 47 Ind. 486; 17 How. 369.

Koons v. St. Louis etc. R. Co., 65 Mo. 592. p. 293.

L.

Lackawanna etc. R. Co. v. Chenewith, 52 Pa. St. 382. pp. 52, 332, 345, 399.
 e 59 Pa. St. 250; 86 Pa. St. 145; 58 Me. 195; 51 N. Y. 395; 20 Minn. 135.

Lacon v. Page, 48 Ill. 499. p. 220.

Lafayette etc. R. Co. v. Ehman, 30 Ind. 83. p. 558.

Lafayette etc. R. Co. v. Sims, 27 Ind. 59. pp. 260, 554.
 e 52 N. H. 604.

Laing v. Colder, 8 Pa. St. 479. pp. 191, 192, 194, 211, 258, 386, 525, 526, 550, 571.
 e 7 Ind. 458; 38 Ga. 432; 64 Pa. St. 229, 230; 17 How. 368; 47 Ind. 486; 57 Pa. St. 344; 45 Pa. St. 215; 18 N. Y. 411; 11 Cush. 99; 30 Pa. St. 239; 76 Pa. St. 513; 4 Iowa, 550; 6 Am. L. Reg. 344; 51 Ill. 339; 6 Nev. 238, 239; 39 Iowa, 249; 16 Pa. St. 77; 55 Pa. St. 59. ? 18 N. Y. 538, 540, 641.

Lake Shore etc. R. Co. v. Greenwood, 79 Pa. St. 373. pp. 343, 344, 377.

Lake Shore etc., R. Co. v. Miller, 25 Mich. 274. p. 294.

Lamb v. Palk, 9 Car. & P. 629. p. 36.
 e 5 Robt. 538; 35 How. Pr. 462; 14 How. 487; 1 Am. L. Reg. 402. ? 7 Best & S. 139.

Lambeth v. North Carolina, 66 N. C. 494. pp. 227, 267, 556.
 e 30 Ohio St. 234.

Landrigan v. The State, 31 Ark. 50. p. 350.

Lane v. Atlantic Works, 107 Mass. 104. p. 551.

Lane v. Cotton, 1 Salk. 143. p. 493.

Lane v. Crombie, 12 Pick. 177. p. 551.
 e 29 Me. 310; 54 Miss. 395; 8 Nev. 114; 7 Wis. 531; 6 Gill, 206; 6 Gray, 70; 4 Gray, 180; 14 Allen, 431; 21 Pick. 147; 13 Ill. 587; 19 Conn. 576; 10 Mete. 365; 24 N. J. L. 270, 284; 18 N. Y. 252; 22 N. H. 563; 7 Wis. 431; 17 Mich. 119; 3 La. An. 646; 20 Ill. 490; 2 Woodb. & M. 345; 2 Hilt. 39; 34 Cal. 164; 25 Me. 49; 16 Pa. St. 468; 20 Ohio, 446; 11 Mete. 444; 4 N. Y. 360; 2 Cush. 605; 12 Mete. 417; 42 Ind. 343; 7 Gray, 97; 6 Iowa, 452, 453; 5 Duer, 24, 25, 27. ? 20 N. Y. 71.

Lateh v. Rumner R. Co., 27 L. J. (Exch.) 155. pp. 214, 406, 414.

Law v. Illinois etc. R. Co., 32 Iowa, 534. p. 343.

- Lawrence v. Barker, 5 Wend. 305. p. 554.
- Lawrence v. New York etc. R. Co., 36 Conn. 63. p. 386.
- Lawrenceburgh etc. R. Co. v. Montgomery, 7 Ind. 474. pp. 265, 331, 345.
 c 36 Mo. 434; 58 Me. 194; 57 N. Y. 392.
- Le Barron v. East Boston Ferry Co., 11 Allen, 312. pp. 208, 209, 213, 215.
 c 97 Mass. 368; 109 Mass. 406; 14 Allen, 457.
- Le Caux v. Eden, 1 Doug. 572. p. 460.
- Le Conteur v. London etc. R. Co., L. R. 1 Q. B. 54; s. c. 12 Jur. (N. s.) 266; 35 L. J. (Q. B.) 40; 14 Week. Rep. 80; 13 L. T. (N. s.) 325; 6 Best & S. 961. p. 516.
 c 3 C. P. Div. 226; L. R. 6 C. P. 50, 51; 40 L. J. (C. P.) 12; Irish Rep. 10 C. L. 77; 32 Wis. 92.
- Lee v. Grand Trunk R. Co., 36 Upper Canada Q. B. 350. pp. 511, 523, 524.
- Leeson v. Holt, 1 Stark. 186. pp. 497, 499.
- Leman v. Gordon, 8 Car. & P. 392. p. 467.
- Leshner v. Wabash Nav. Co., 14 Ill. 85. p. 418.
- Lester v. Pittsford, 7 Vt. 158. p. 553.
- Levering v. Union Transp. Co., 42 Mo. 88. p. 386.
- Lewellen (The), 4 Ben. 156. p. 482.
- Lewis v. London etc. R. Co., L. R. 9 Q. B. 66; s. c. 43 L. J. (Q. B.) 8. pp. 230, 232, 268.
 c 44 L. J. (Q. B.) 113; L. R. 10 Q. B. 273; 36 Upper Canada Q. B. 369. d L. R. 9 C. P. 133, 134; 43 L. J. (C. P.) 139.
- Liddy v. St. Louis R. Co., 40 Mo. 506. p. 245.
- Lillis v. St. Louis etc. R. Co., 64 Mo. 464. pp. 69, 71, 340, 376, 377.
 d 66 Mo. 595.
- Limpus v. London General Omnibus Co., 1 Hurl. & Colt. 526. pp. 371, 373.
- Lincoln v. Saratoga etc. R. Co., 23 Wend. 425. pp. 569, 572.
 c 1 Duer, 239; 63 Barb. 266; 48 N. H. 545.
- Lindo v. Rodney, 1 Doug. 591. p. 460.
- Lindsay v. Central etc. R. Co., 46 Ga. 447. p. 375.
- Linnehan v. Sampson, 8 Cent. L. J. 442. p. 20.
- Lion (The), L. R. 2 Adm. 102; s. c. 38 L. J. (Adm.) 51. p. 463.
- Liscomb v. New Jersey Transp. Co., 6 Lans. 75. p. 107.
- Little Miami R. Co. v. Wetmore, 19 Ohio St. 110. pp. 370, 553.
 c 21 Ohio St. 524; 44 Iowa, 318; 28 Ohio St. 29.
- Lloyd v. Hannibal etc. R. Co., 53 Mo. 509. pp. 227, 267, 553, 584.
 c 66 Mo. 599; 2 Cent. L. J. 541; 59 Mo. 37.
- Lockhart v. Lichtenthaler, 46 Pa. St. 161; s. c. 4 Am. L. Reg. (N. s.) 15; pp. 52, 283, 288.
 c 52 Pa. St. 387; 11 Abb. Pr. (N. s.) 420; 36 N. J. L. 228, 229; 57 Pa. St. 192. ? 43 Wis. 527; 6 Cent. L. J. 430.
- London etc. R. Co. v. James, L. R. 8 Ch. 241. p. 475.
 c 2 App. Cas. 808.
- London etc. R. Co. v. Watson, 4 C. P. Div. 118; s. c. 3 C. P. Div. 429; 27 Week. Rep. 614. p. 337.
- Long v. Horne, 1 Car. & P. 610. pp. 68, 236.
- Longmore v. Great Western R. Co., 19 C. B. (N. s.) 183. pp. 90, 91, 92, 101, 107. (In full, p. 81.)
 c 56 Me. 243, 245; 26 Iowa, 145; 12 Jur. (N. s.) 273. d L. R. 1 C. P. 301, 303, 304, 305; 35 L. J. (C. P.) 135.
- Lord v. Midland R. Co., L. R. 2 C. P. 345. p. 68.
- Lords Bailiffs-Jurats of Romney Marsh v. Trinity House, L. R. 5 Exch. 204 (affirmed, L. R. 7 Exch. 247); s. c. 2 Thomp. on Neg. p. 1063. p. 220.
- Loring v. Aborn, 4 Cush. 608. p. 336.
 c 22 Barb. 133.
- Losee v. Buchanan, 51 N. Y. 476; s. c. 61 Barb. 86; 1 Thomp. on Neg. 47. p. 222.
 c 68 Me. 165; 47 Ind. 271; 56 N. Y. 126; 1 N. Y. S. C. (T. & C.) 455; 6 Hun, 324; 38 N. J. L. 346; 41 Wis. 73; 57 N. Y. 572; 53 N. H. 448; 43 Am. L. Reg. (N. s.) 371.
- Louisville etc. R. Co. v. Case's Administrator, 9 Bush, 728. p. 290.
- Louisville etc. R. Co. v. Mahan, 8 Bush, 184. pp. 534, 536.
 c 73 Ill. 513.

Louisville etc. Canal Co. *v.* Murphy, 9 Bush, 552. pp. 552, 562.

e 5 Reporter, 720; 13 Bush, 642; 10 Bush, 273; 9 Bush, 731; 12 Bush, 47.

Louisville etc. R. Co. *v.* Sickings, 5 Bush, 1. p. 257.

e 7 Bush, 239; 39 Md. 350.

Louisville etc. R. Co. *v.* Yandell, 17 B. Mon. 586. p. 49.

e 7 Bush, 239; 17 B. Mon. 598. d 7 Bush, 10.

Lovett *v.* Hobbs, 2 Show. 128. p. 26. e 12 Ga. 228.

Lovett *v.* Salem etc. R. Co., 9 Allen, 557. pp. 228, 267, 374, 375, 443, 547.

e 55 Ind. 50; 37 Cal. 405; 48 Miss. 117, 118, 123; 28 Ohio St. 30; 5 N. Y. S. C. (T. & C.) 480; 3 Hun, 334; 64 N. Y. 138; 56 Ind. 518; 52 N. H. 554.

Lower Macungie Township *v.* Merkhoffer, 71 Pa. St. 276. p. 220.

e 81 Pa. St. 50; 13 Hun, 87.

Lucas *v.* Milwaukee etc. R. Co., 33 Wis. 41. pp. 52, 345.

Lucas *v.* New Bedford etc. R. Co., 6 Gray, 64. pp. 49, 50, 225, 227, 252, 267, 334, 551.

e 8 Allen, 230, 235, 448; 57 Barb. 651; 63 N. Y. 560; 59 Mo. 34; 1 Allen, 190; 8 Kan. 517; 3 Allen, 22; 14 Allen, 493; 106 Mass. 275; 101 Mass. 446; 58 Me. 199; 49 N. Y. 52; 16 Gray, 507; 17 Mich. 119, 120; 4 Allen, 289; 95 U. S. 443. d 104 Mass. 141.

Lucas *v.* Taunton etc. R. Co., 6 Gray, 70. p. 329.

e 6 Cent. L. J. 47; 2 Cent. L. J. 540; 59 Mo. 34.

Luxford *v.* Large, 5 Car. & P. 421. p. 275.

Lygo *v.* Newbold, 9 Exch. 302. pp. 329, 334.

e 19 Ohio St. 411; 47 Ind. 48; 55 How. Pr. 173; 48 Pa. St. 221; 4 Allen, 286; 25 Mich. 7; 6 Gray, 70; 68 Me. 558; 34 Upper Canada Q. B. 459; 58 Me. 198; 57 N. Y. 391; 59 Pa. St. 142, 143; 23 Upper Canada C. P. 551.

Lynam *v.* Union R. Co., 114 Mass. 83. pp. 261, 446.

Lynch *v.* Nurdin, 1 Q. B. 29; s. c. 4 Per. & Dav. 672; 5 Jur. 797; 2 Thomp. on Neg. 1140. p. 275.

e 69 Pa. St. 215; 6 Gray, 71; 17 Wall. 660; 1 Head, 619, 620; 51 Me. 333; Irish Rep. 15 C. L. 345; 24 N. J. L. 832; 8 Minn. 163; 31 Miss. 193, 197, 198; 47 Miss. 422; 52 Mo. 439, 440; 75

Ill. 97; 52 N. H. 554; 9 Wis. 212, 219; 6 N. Y. 410; 24 Vt. 496; 22 N. J. L. 189; 18 Cal. 356; 22 Vt. 225, 226; 35 N. Y. 211; 48 Pa. St. 221, 222; 60 Mo. 418, 420; 35 N. H. 279; 15 Ind. 489; 31 Pa. St. 378; 47 Pa. St. 304; 3 Cus-h. 305; 13 Ill. 538, 589; 24 Md. 125; 9 C. B. 420; 19 Conn. 511, 512, 572, 573, 574; 5 El. & Bl. 856; 2 Jur. (N. s.) 118; 25 L. J. (Q. B.) 124; 18 Ohio St. 410; 36 Mo. 491; 2 Cnsh. 543; 50 Mo. 468; 14 Jur. 336; 19 L. J. (C. P.) 200; 18 N. Y. 252; 16 Ill. 202; 20 Ill. 494, 496; 1 Sweeny, 542; 3 Q. B. Div. 331; 7 Cent. L. J. 12; 17 Alb. L. J. 506; 1 Denio, 99; 26 Conn. 600; 1 Hurl. & N. 780; 3 Jur. (N. s.) 396; 26 L. J. (Exch.) 172; 47 Ind. 48; 17 Mich. 118; 6 Daly, 11; 12 Cal. 559; 20 Ill. 496; 59 Pa. St. 142, 143; 53 Ala. 79; 14 Minn. 96; 65 Pa. St. 276; 21 Minn. 212, 213; 1 Keyes, 573; 33 How. Pr. 200; 2 Abb. App. Dec. 381; 27 Conn. 409; 9 Exch. 305, 306; 18 Ga. 636; 13 Ga. 88; 38 N. Y. 458; 4 Gray, 405, 407, 410; 55 How. Pr. 172; 17 Iowa, 463; 14 Allen, 298; 32 Me. 51, 53; 24 N. J. L. 271; 22 Mo. 378; 63 N. C. 349; 66 Barb. 50; 15 Abb. Pr. (N. s.) 323; 27 Gratt. 476; 41 N. Y. 46; 9 Exch. 304; 18 N. Y. 252; 23 Upper Canada C. P. 551; 37 Mo. 550, 553. ? 60 N. Y. 334; 27 Ind. 515, 516; 4 Allen, 286, 287; 11 Allen, 519.

Lyon *v.* Mells, 5 East, 428. pp. 115, 136, 143, 144, 157, 357.

M.

Mabley *v.* Kittleberger, 37 Mich. 360. p. 284.

Macauley *v.* New York etc. R. Co., 67 N. Y. 602. p. 220.

Macdougall *v.* Torrance, 4 Lower Canada Jur. 132. pp. 512, 538.

Macklin *v.* New Jersey Steamboat Co., 9 Am. L. Reg. (N. s.) 237; s. c. 7 Abb. Pr. (N. s.) 229. pp. 518, 529, 530.

e 32 Wis. 91, 97. o 2 Ch. Leg. N. 397; 2 Abb. Pr. (N. s.) 52.

Macon etc. R. Co. *v.* Johnson, 38 Ga. 409. pp. 260, 560.

e 52 Ga. 463; 53 Ga. 16, 17.

Macrow *v.* Great Western R. Co., L. R. 6 Q. B. 612; s. c. 40 L. J. (Q. B.) 300; 24 L. T. (N. s.) 618; 19 Week. Rep. 873. pp. 507, 510, 512.

e 32 Wis. 98.

Mad River etc. R. Co. *v.* Fulton, 20 Ohio, 319. p. 538.

e 7 Rich. L. 163; 1 Hilt. 282; 6 Ind. 247.

Madan *v.* Sherrard, 10 Jones & Sp. 353; 3 Abb. N. C. 525. p. 527.

- Magnire v. Middlesex R. Co.*, 115 Mass. 239. pp. 261, 271, 444, 556.
- Maher v. Central Park R. Co.*, 7 Jones & Sp. 52; s. c. 67 N. Y. 52. pp. 445, 577.
- Maillard v. Lawrence*, 16 How. 251. p. 486.
- Malecek v. Tower Grove R. Co.*, 57 Mo. 17. pp. 365, 368, 370, 559, 575, 581. c 66 Mo. 541.
- Mali v. Lord*, 39 N. Y. 381. p. 371.
- Malone v. Boston etc. R. Co.*, 12 Gray, 388. pp. 524, 547. c 29 Ind. 363; 14 Allen, 457.
- Mallory v. Griffey*, 85 Pa. St. 275. p. 552.
- Malton v. Nesbit*, 1 Car. & P. 70. p. 560. c 1 McLean, 545.
- Mangam v. Brooklyn etc. R. Co.*, 38 N. Y. 455. p. 562. c 47 N. Y. 322, 324; 68 Me. 556; 17 Wall. 665; 60 N. Y. 333; 38 Wis. 629; 64 N. Y. 18; 55 Ind. 50; 5 Hun, 481; 66 Me. 381; 2 N. Y. S. C. (T. & C.) 646; 9 Bush, 531; 63 N. Y. 106, 107; 48 How. Pr. 81; 7 Jones & Sp. 351; 3 Abb. App. Dec. 277; 56 Ind. 518; 66 Barb. 56; 15 Abb. Pr. (N. S.) 328; 45 Mo. 74; 2 Jones & Sp. 485; 43 How. Pr. 410; 15 N. Y. 408; 40 Barb. 207, 208.
- Manhattan (The)*, 2 Ben. 88; s. c. 7 Int. Rev. Rec. 28. p. 479.
- Mann v. Birchard*, 40 Vt. 326; s. c. 7 Am L. Reg. (N. S.) 702. p. 386. c 17 How. 367. ? 47 Ind. 486.
- Maples v. New York etc. R. Co.*, 38 Conn. 557. pp. 69, 336, 338, 375.
- Marfell v. South Wales R. Co.*, 8 C. B. (N. S.) 525; s. c. 7 Jur. (N. S.) 240; 29 L. J. (C. P.) 315; 8 Week. Rep. 765; 2 L. T. (N. S.) 629. p. 84.
- Markham v. Brown*, 8 N. H. 523. pp. 4, 364.
- Maroney v. Old Colony R. Co.*, 106 Mass. 153. p. 69. c 36 Wis. 675. d 48 Vt. 235.
- Marquette v. Chicago etc. R. Co.*, 33 Iowa, 563. pp. 301, 302, 375.
- Marshall v. Bazin*, 7 N. Y. Leg. Obs. 342. p. 467.
- Marshall v. Wellwood*, 38 N. J. L. 339. p. 222.
- Marshall v. York etc. R. Co.*, 11 C. B. 655; 16 Jur. 124; 21 L. J. (C. P.) 34; 7 Eng. Law & Eq. 519. p. 524. c 34 Upper Canada Q. B. 462; 19 Ohio St. 655.
- Martin v. Great Northern R. Co.*, 16 C. B. 179; s. c. 3 Com. Law Rep. 817; 1 Jur. (N. S.) 613; 30 Eng. Law & Eq. 473. pp. 74, 78, 99, 101, 107, 108, 109, 110, 269. c 56 Me. 243; 26 Iowa, 143, 145; 18 N. Y. 252.
- Martinez v. Gerber*, 3 Scott's N. R. 386; s. c. 3 Man. & G. 88. p. 547.
- Maryland v. Northern etc. R. Co.*, 18 Md. 193. p. 543.
- Masters v. Warren*, 27 Conn. 293. p. 571. c 33 Conn. 55; 44 Iowa, 322; 6 Nev. 230, 233.
- Matteson v. New York etc. R. Co.*, 62 Barb. 364. pp. 559, 564, 565. c 11 Nev. 369.
- Mattison v. New York etc. R. Co.*, 57 N. Y. 552; s. c. 19 Alb. L. J. 359; 8 Reporter, 440. pp. 532, 534, 536.
- Maund v. Monmouth Canal Co.*, 4 Man. & G. 452. p. 359.
- Maury v. Talmadge*, 2 McLean, 157. pp. 199, 238, 240, 241, 242, 558, 560. c 48 N. H. 316; 11 Gratt. 712; 17 Ill. 410; 1 Abb. Adm. 359.
- Maving v. Todd*, 1 Stark. 72. p. 496.
- Maverick v. Eighth Avenue R. Co.*, 36 N. Y. 378. p. 433. c 5 Hun, 526; 63 Barb. 266.
- Max v. Roberts*, 12 East, 89. p. 542.
- May v. Davidson*, 18 Minn. 523. p. 223.
- May v. Princeton*, 11 Metc. 442. p. 551.
- Mayhew v. Boyce*, 1 Stark. 423. pp. 237, 240.
- Mayo v. Boston etc. R. Co.*, 104 Mass. 137. pp. 270, 551. c 109 Mass. 521; 115 Mass. 199; 106 Mass. 462; 120 Mass. 262, 266; 107 Mass. 108; 123 Mass. 515; 6 Cent. L. J. 108; 5 Reporter, 238; 114 Mass. 87, 88; 112 Mass. 47; 110 Mass. 339; 6 Cent. L. J. 138; 5 Reporter, 238; 121 Mass. 338; 8 Cent. L. J. 444.
- Mayor v. Humphreys*, 1 Car. & P. 251. p. 555. c 17 Ill. 552; 7 Hill, 539.
- McCahan v. Hirst*, 7 Watts, 175. p. 542.
- McCall v. Forsyth*, 4 Watts & S. 179. pp. 544, 545. (In full, p. 541.) c 17 Ill. 412.

- McCarthy v. Chicago etc. R. Co., 41 Iowa, 432. p. 376.
- McCarthy v. Dublin etc. R. Co., Irish Rep. 3 C. L. 511. p. 337.
- McCarthy v. Guild, 12 Metc. 291. p. 547.
 c 11 Gray, 30; 117 Mass. 543.
- McCawley v. Furness R. Co., 42 L. J. (Q. B.) 4; s. c. L. R. 8 Q. B. 57; 21 Week. Rep. 140; 27 L. T. (N. S.) 485. pp. 400, 401, 402.
- McClary v. Sioux City etc. R. Co., 3 Neb. 44. pp. 199, 214.
- McClenaghan v. Brock, 5 Rich. L. 17. pp. 370, 563.
 c 9 Rich. L. 93; 30 Ala. 611; 50 Mo. 103.
- McClure v. Philadelphia etc. R. Co., 34 Md. 532. pp. 70, 71.
 c 51 Cal. 423; 5 Daly, 51; 61 Barb. 613.
- McCormick v. Hudson River R. Co., 4 E. D. Smith, 181. pp. 434, 435, 512.
 c 30 N. Y. 617.
- McCormick v. Pennsylvania etc. R. Co., 49 N. Y. 303. pp. 28, 519, 538.
- McDonald v. Chicago etc. R. Co., 26 Iowa, 124; s. c. 29 Iowa, 170. pp. 104, 114, 269, 565, 572. (In full, p. 93.)
 c 28 Mich. 453; 48 Vt. 106; 10 Jones & Sp. 161; 39 Iowa, 586.
- McDougall v. Allan, 6 Lower Canada Jur. 233; s. c. 12 Lower Canada Rep. 321. pp. 486, 512, 530.
- McElroy v. Nashua etc. R. Corp., 4 Cush. 400. pp. 201, 220, 357, 412. (In full, p. 409.)
 c 56 Me. 242; 3 Cliff. 422; 21 Ind. 233, 238, 297; 97 Mass. 368; 9 Cent. L. J. 132; 8 Allen, 233; 48 N. H. 315; 5 Hun, 526; 11 Allen, 505.
- McGill v. Rowand, 3 Pa. St. 451. pp. 512, 524, 539.
 c 41 Miss. 678; 14 Fla. 536; 14 Pa. St. 133; 9 Lower Canada, 180; 13 Ill. 750; 6 Cush. 72; 13 Ill. 420; 11 Humph. 422.
- McGloin v. Henderson, 6 La. 715. p. 466.
- McGrath v. Hudson River R. Co., 32 Barb. 144; s. c. 19 How. Pr. 211. p. 563.
 c 3 Daly, 385; 32 Barb. 164; 35 N. Y. 37; 29 Md. 439; 2 Jones & Sp. 436; 43 How. Pr. 411; 33 Barb. 509.
- McGuire v. The Golden Gate, McAll. 104. p. 470.
- McIntyre v. New York etc. R. Co., 43 Barb. 532; s. c. 37 N. Y. 238. p. 265.
 c 30 Ohio St. 234, 461, 464; 67 N. Y. 55; 33 Iowa, 569; 63 Barb. 266; 49 N. Y. 53, 55.
- McKeon v. Citizens' R. Co., 42 Mo. 79. pp. 368, 442, 446, 575.
 c 57 Me. 252; 50 Mo. 140.
- McKinley v. Chicago etc. R. Co., 44 Iowa, 314; s. c. 17 Am. L. Reg. 69. pp. 345, 369, 374, 572, 581.
 c 45 Iowa, 573. d 47 Iowa, 88; 10 Ch. Leg. N. 83.
- McKinney v. Neil, 1 McLean, 540. pp. 114, 199, 211, 266, 411.
 c 38 Miss. 275; 4 Iowa, 548, 550; 2 Mont. 525, 526; 44 Ind. 204; 17 Ill. 410, 411, 552; 27 La. An. 552; 48 N. H. 316; 16 Barb. 117; 15 Ill. 471; 16 Ill. 567, 569, 570; 4 G. Greene, 558, 560.
- McLean v. Burbank, 11 Minn. 277. pp. 211, 412, 414.
- McMahon v. Davidson, 13 Minn. 357. p. 223.
- McMannus v. Crickett, 1 East, 106; s. c. 2 Thomp. on Neg. 865. pp. 358, 363.
 c 22 N. Y. 367; 2 Har. & G. 319; 3 Head, 473; 12 Iowa, 349; 18 Mo. 368; 4 Metc. 55; 50 Mo. 108; 20 Ohio, 441; 26 Miss. 400; 4 Man. & G. 58; 12 Minn. 373; 6 Reporter, 404; 18 Alb. L. J. 91; 48 Miss. 118, 125; 5 Cush. 594; 31 N. J. L. 231; 4 So. Car. 68; 64 N. Y. 134; 7 Cush. 336; 19 Wend. 345, 347; 43 N. Y. 569; 12 Allen, 53; 3 East, 602; 6 Harl. & N. 364, 365; 13 Ill. 235; 47 N. Y. 127; 7 Yerg. 379; 24 Conn. 266; 46 N. H. 233; 46 N. Y. 27; 57 Me. 233; 38 Miss. 278; 3 Cliff. 423. ? 2 Mo. App. 45; 36 Wis. 669; 30 L. J. (Exch.) 191.
- McMicken v. Brown, 6 Mart. (N. S.) 86. p. 554.
- McPadden v. New York etc. R. Co., 44 N. Y. 478; s. c. 47 Barb. 247. pp. 199, 220.
 c 66 N. Y. 320; 58 N. Y. 139.
- McQuesten v. Sanford, 40 Me. 117. p. 513.
- McQuiliken v. Central Pacific R. Co., 50 Cal. 7. p. 552.
- Meesel v. Lynn etc. R. Co., 8 Allen, 234. pp. 261, 444.
 c 100 Mass. 212; 33 Iowa, 569.
- Meier v. Pennsylvania R. Co., 64 Pa. St. 225. pp. 199, 206, 211, 212, 215.
 c 2 Col. 457; 76 Pa. St. 513.

- Memphis etc. R. Co. v. Chastine, 54 Miss. 503. pp. 376, 556.
- Memphis etc R. Co. v. Whitfield, 44 Miss. 466. pp. 66, 556, 562, 565, 571, 573.
 c 30 Ohio St. 464.
- Merchants' Bank v. State Bank, 10 Wall. 605. p. 252.
- Merrill v. Grinnell, 30 N. Y. 594. pp. 511, 520, 521, 538.
 c 15 Mich. 142; 42 N. Y. 328; 9 Hun, 671; 56 Me. 72; 8 Am. L. Reg. 400.
- Merrill v. Hampden, 26 Me. 234. p. 552.
 c 65 Me. 552; 27 Vt. 465; 35 Me. 104; 35 N. H. 276; 37 Me. 252.
- Merrimack (The), 1 Ben. 201. pp. 463, 471.
 c 3 Sawyer, 314.
- Merryweather v. Nixan, 8 Term Rep. 186. p. 542.
- Metcalf v. Baker, 2 Jones & Sp. 10; s. c. 11 Abb. Pr. (N. S.) 431. p. 294.
- Metropolitan R. Co. v. Jackson, 3 App. Cas. 193. pp. 200, 206, 214, 225, 264.
- Meyer v. Pacific R. Co., 40 Mo. 153. p. 245.
- Meyer v. Second Avenue R. Co., 8 Bosw. 305. p. 367.
- Michigan R. Co. v. Heaton, 31 Ind. 397. p. 389.
- Michigan etc. R. Co. v. Carrow, 73 Ill. 348. pp. 511, 512, 558.
- Michigan etc. R. Co. v. Coleman, 26 Mich. 440. p. 208.
- Michigan etc. R. Co. v. Dolan, 32 Mich. 510. p. 208.
- Michigan etc. R. Co. v. Gougar, 55 Ill. 503. p. 558.
- Michigan etc. R. Co. v. Lantz, 29 Ind. 528. pp. 552, 553.
 c 47 Ind. 45; 37 Ind. 547; 42 Ind. 341; 35 Ind. 466. ? 48 Cal. 426.
- Michigan etc. R. Co. v. Meyres, 21 Ill. 627. pp. 513, 515.
 c 73 Ill. 618.
- Michigan etc. R. Co. v. Oehm, 56 Ill. 293. pp. 511, 523, 537.
- Middleton v. Fowler, 1 Salk. 282. p. 521.
- Midland R. Co. v. Bromley, 17 C. B. 372; s. c. 2 Jur. (N. S.) 140; 25 L. J. (C. P.) 94. p. 532.
 c 12 Am. L. Reg. 373; 31 Wis. 632.
- Milan (The), 1 Lush. 386. pp. 285, 475.
- Milk v. Middlesex etc. R. Co., 99 Mass. 167. p. 444.
- Miller v. St. Louis R. Co., 5 Mo. App. 471; s. c. 6 Cent. L. J. 335. pp. 212, 259, 261, 446.
- Milliman v. New York etc. R. Co., 66 N. Y. 642; s. c. 6 Thomp. & C. 585; 3 Abb. N. C. 525. pp. 227, 271.
- Milwaukee etc. R. Co. v. Arms, 3 Cent. L. J. 220. pp. 573, 574.
 c 18 Kan. 523.
- Milwaukee etc. R. Co. v. Finney, 10 Wis. 388. p. 362, 364, 575.
 c 44 Iowa, 318; 57 Me. 215, 248; 42 Wis. 666, 673, 674; 3 Cliff. 428; 36 Wis. 670, 671, 675, 676; 20 Wall. 541; 106 Mass. 189; 2 Mont. 521.
- Milwaukee etc. R. Co. v. Hunter, 11 Wis. 160. pp. 552, 553.
 c 18 Wis. 332; 34 Iowa, 161; 41 Wis. 108, 109.
- Minor v. Chicago etc. R. Co., 19 Wis. 40. pp. 532, 534.
 c 73 Ill. 515.
- Minter v. Pacific R. Co., 41 Mo. 503. pp. 514, 523.
 c 54 Mo. 389.
- Mississippi etc. R. Co. v. Kennedy, 41 Miss. 671. pp. 510, 511, 512, 521, 537.
 d 2 Ch. Leg. N. 397; 2 Abb. U. S. 51; 50 Miss. 319.
- Missouri etc. R. Co. v. Weaver, 16 Kan. 456. pp. 577, 579.
 c 18 Kan. 523.
- Mitchell v. Western etc. R. Co., 30 Ga. 22. p. 226.
- Mobile etc. R. Co. v. Hopkins, 41 Ala. 486. pp. 524, 525, 526, 533.
 c 20 Minn. 129; 2 Cent. L. J. 367; 41 Ala. 647.
- Mobile etc. R. Co. v. McArthur, 43 Miss. 180. pp. 66, 343, 564.
 c 64 Mo. 475; 50 Miss. 318.
- Montgomery etc. R. Co. v. Boring, 51 Ga. 582. pp. 565, 577, 584.
- Moore v. American Transp. Co., 24 How. 1. p. 484.

- Moore v. Central R. Co., 24 N. J. L. 268. p. 552.
 c 39 N. J. L. 192; 18 N. Y. 252; 35 Ind. 466.
- Moore v. Evans, 14 Barb. 524. pp. 386, 525.
- Moore v. Evening Star, 20 La. An. 402. pp. 471, 513, 521.
 c 27 La. An. 92.
- Moore v. Fitchburg R. Co., 4 Gray, 465. pp. 317, 358, 362, 374.
 c 3 Cliff. 424, 429; 36 Wis. 463; 104 Mass. 120, 121; 11 Nev. 364; 36 Wis. 675; 19 Ill. 374; 38 Ind. 126; 57 Me. 215; 12 Allen, 581. d 48 Vt. 235.
- Moore v. Metropolitan R. Co., 42 L. J. (Q. B.) 23; s. c. L. R. 8 Q. B. 36. p. 373.
- Moore v. Shreveport, 3 La. An. 645. p. 553.
- Morning Star (The), 4 Biss. 62. p. 481.
- Morel v. Mississippi Ins. Co., 4 Bush, 535. p. 257.
 c 5 Bush, 7.
- Morgan v. Vale of Neath R. Co., 5 Best & S. 736; s. c. L. R. 1 Q. B. 149; 35 L. J. (Q. B.) 23; 13 L. T. (N. s.) 564; 14 Week. Rep. 144 (affirming s. c. 5 Best & S. 570; 10 Jur. (N. s.) 1074; 33 L. J. (Q. B.) 260; 13 Week. Rep. 1031). p. 146.
 c L. R. 10 Q. B. 128; 44 L. J. (Q. B.) 61 62; 86 Pa. St. 440; 2 Exch. Div. 397; 46 L. J. 528; 45 L. J. 389, 390; 28 Ind. 376; L. R. 1 C. P. 296; L. R. 2 Exch. 32, 33; 4 Hurl. & Colt. 699; 36 L. J. (Exch.) 10; 53 Pa. St. 456, 459; 15 Rich. L. 210; 7 Cent. L. J. 453; 18 Alb. L. J. 135, 136; 53 Ill. 340; 49 Barb. 326; 28 Ind. 376; 3 Exch. Div. 344; 7 Best & S. 681; 3 C. P. Div. 494, 498; 13 Allen, 444; 44 Md. 292; 62 Me. 465; 6 Reporter, 126; 1 C. P. Div. 167, 168; 59 Pa. St. 247, 252.
- Morris v. Gleason, 1 Bradw. 510. p. 222.
- Morris etc. R. Co. v. Ayres, 29 N. J. L. 393. p. 313.
- Morris v. Third Avenue R. Co., 1 Daly, 202. pp. 522, 536.
- Morrissey v. Wiggins Ferry Co., 43 Mo. 380. p. 257. (In full, p. 243.)
- Morrison v. Erie R. Co., 56 N. Y. 302. pp. 227, 228, 267.
 c 63 N. Y. 560; 8 Jones & Sp. 182, 183
- Morse v. Auburn etc. R. Co., 10 Barb. 621. p. 511.
 c 44 Miss. 496; 3 Jones & Sp. 129; 6 Nev. 235, 237.
- Morse v. Connecticut River R. Co., 6 Gray, 450. pp. 539, 558.
 c 111 Mass. 51; 56 Ga. 500.
- Morse v. Richmond, 41 Vt. 435. p. 220.
- Morse v. Slue, Sir T. Raym. 120; s. c. 1 Vent. 190. pp. 150, 499.
- Mosher v. Lawrence, 4 Denio, 421. p. 554.
- Mote v. Chicago etc. R. Co., 27 Iowa, 22. pp. 534, 535, 537.
- Mount Vernon v. Dusouchett, 2 Ind. 586. p. 552.
 c 17 Ind. 105; 23 Ind. 134; 7 Ind. 83; 42 Ind. 343; 5 Ind. 290; 12 Ind. 523; 2 Disney, 521; 7 Iowa, 489; 10 Ind. 401.
- Mudgett v. Bay State Steamboat Co., 1 Daly, 151. p. 518.
 c 15 Mich. 138; 32 Wis. 92; 2 Daly, 355.
- Muldowney v. Illinois etc. R. Co., 39 Iowa, 615; s. c. 36 Iowa, 462. pp. 552, 571.
 c 43 Iowa, 667; 33 Iowa, 60; 40 Iowa, 343, 344, 346, 402; 45 Iowa, 664; 38 Iowa, 280; 44 Iowa, 320; 68 Me. 105.
- Mulhado v. Brooklyn etc. R. Co., 30 N. Y. 370. pp. 227, 444, 445, 561.
 c 28 Mich. 455.
- Mulherrin v. Delaware etc. R. Co., 81 Pa. St. 366. p. 233.
- Mulloy v. Backer, 5 East, 316; s. c. 1 Smith, 447. p. 467.
 c 2 Gray, 360; Abb. Adm. 51.
- Munster v. South-Eastern R. Co., 4 Jur. (N. s.) 738; s. c. 27 L. J. (C. P.) 308; 4 C. B. (N. s.) 676. pp. 513, 529.
 c L. R. 6 C. P. 51; 40 L. J. (C. P.) 12.
- Murch v. Concord etc. R. Co., 29 N. H. 9. pp. 25, 101, 109, 235, 412, 413, 417.
 c 56 Me. 243; 33 Wis. 63; 26 Iowa, 145; 15 Gray, 24; 44 N. H. 332; 40 Miss. 386; 47 N. H. 332; 46 N. H. 221. d 33 Wis. 56.
- Murphy v. Commissioners of Emigration, 28 Y. N. 134. pp. 28, 520.
 c 3 Daly, 397, 398.
- Murphy v. Deane, 101 Mass. 455. p. 551.
 c 105 Mass. 78; 120 Mass. 262; 74 N. C. 658, 42 Ind. 343; 68 Me. 558.

Murphy v. Chicago etc. R. Co., 45 Iowa, 661; s. c. 38 Iowa, 539. p. 552.
 c 42 Iowa, 446.

Murphy v. New York etc. R. Co., 66 Barb. 125. pp. 557, 560, 561.

Murphy v. Staton, 3 Munf. 239. p. 498.

Murphy v. Union R. Co., 118 Mass. 228. pp. 301, 302, 303, 375, 443.

c 28 Ohio St. 200

Muschamp v. Lancaster etc. R. Co., 8 Mee. & W. 421. pp. 55, 428.

Mytton v. Midland R. Co., 4 Hurl. & N. 615; s. c. 28 L. J. (Exch.) 385. pp. 432, 435.

c 35 Upper Canada Q. B. 558; 5 Hurl. & N. 277; 29 L. J. (Exch.) 169; 34 Upper Canada Q. B. 234; 18 Upper Canada C. P. 530.

N.

Najac v. Boston etc. R. Co., 7 Allen, 329. pp. 432, 514, 529.

c 12 Wall. 85; 109 Mass. 405; 14 Allen, 436; 11 Allen, 297.

Nashville etc. R. Co. v. Carroll, 6 Heisk. 347. p. 417.

Nashville etc. R. Co. v. Messino, 1 Sneed, 220. pp. 26, 27, 29, 202.

Nashville etc. R. Co. v. Sprayberry, 9 Heisk. 852; s. c. 1 Cent. L. J. 541. pp. 432, 433.

National Express Co. v. Drew, 2 Macq. H. L. Cas. 103; s. c. 33 Eng. Law & Eq. 1; 1 Pat. Sc. App. 482. p. 359.

Nebraska City v. Campbell, 2 Black, 590. p. 551.

c 32 Iowa, 328; 122 Mass. 370, 380; 58 N. Y. 395; 102 Mass. 500; 5 Neb. 452; 26 Iowa, 268; 2 Col. 160; 11 Allen, 79; 91 U. S. 551; 63 Barb. 266.

Nellis v. New York etc. R. Co., 30 N. Y. 505. pp. 341, 342, 343.

c 15 N. Y. Supreme Ct. 581.

Nelson v. Chicago etc. R. Co., 38 Iowa, 564. p. 552.

c 27 Vt. 379; 28 Vt. 304, 305.

Nelson v. Long Island R. Co., 7 Hun, 140. pp. 30, 43, 71, 340, 376.

Nelson v. Vermont etc. R. Co., 26 Vt. 717. p. 418.

Nevins v. Bay State Steamboat Co., 4 Bosw. 225. pp. 472, 512, 522, 527, 534.

c 46 N. H. 219.

Newberry v. Lee, 3 Hill, 523. p. 554.

New Jersey etc. R. Co. v. Kennard, 21 Pa. St. 203. pp. 200, 258.

c 51 Ill. 339; 48 N. H. 315; 63 Pa. St. 17. d 64 Pa. St. 229. 7 39 Md. 344; 29 Ind. 86. o 56 Pa. St. 296.

New Jersey Express Co. v. Nichols, 32 N. J. L. 166; s. c. 33 N. J. L. 434. p. 552.

c 39 N. J. L. 192; 38 N. J. L. 529; 33 Wis. 75; 33 N. J. L. 439.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344. pp. 381, 383, 391, 480.

New Orleans etc. R. Co. v. Allbritton, 38 Miss. 242. pp. 212, 556, 559, 572, 575.

c 44 Miss. 490.

New Orleans etc. R. Co. v. Bailey, 40 Miss. 395. pp. 374, 417.

New Orleans etc. R. Co. v. Burke, 53 Miss. 201. pp. 301, 303, 304, 305, 364.

New Orleans etc. R. Co. v. Hurst, 36 Miss. 660. pp. 65, 66, 369, 544, 545, 546, 571, 574, 577, 581.

New Orleans etc. R. Co. v. Moore, 40 Miss. 39. pp. 511, 536, 537.

New Orleans etc. R. Co. v. Statham, 42 Miss. 607. pp. 66, 226, 227, 270, 271, 574, 577, 582.

c 41 Miss. 490, 491, 493; 59 Ind. 320; 4 Col. 348.

New Orleans Mutnal Ins. Co. v. New Orleans etc. R. Co., 20 La. An. 302. p. 389.

New Orleans v. The Windermere, 12 La. An. 84. p. 474.

New York etc. R. Co. v. Fraloff, 9 Cent. L. J. 432; s. c. 8 Reporter, 801; 20 Alb. L. J. 409. pp. 486, 510, 528, 530. (In full, p. 502.)

Newman v. Walters, 3 Bos. & Pul. 612. p. 471.

d 1 Lush. 325.

Nicholls v. Great Southern R. Co., Irish Rep. 7 C. L. 40; s. c. 21 Week. Rep. 387. pp. 229, 231, 232, 233, 268.

Nichols v. Middlesex R. Co., 106 Mass. 463. p. 444.

Nichols v. Sixth Avenue R. Co., 38 N. Y. 131. pp. 268, 444, 563.

- Nicholson v. Erie R. Co., 41 N. Y. 525.
p. 225.
- Nicholson v. Lancashire etc. R. Co., 3 Hurl. & Colt. 534; s. c. 34 L. J. (Exch.) 84; 12 L. T. (N. s.) 391. pp. 108, 109, 269. (In full, p. 85.)
c 56 Me. 243.
- Nicholson v. Willan, 5 East, 507. pp. 495, 497, 499.
- Nieto v. Clark, 1 Cliff. 145. pp. 314, 317, 361, 365, 470.
c 3 Cliff. 427; 106 Mass. 189; 36 Wis. 460, 463, 672, 675; 57 Me. 217.
- Nimrod (The), 7 Notes of Cas. 559. p. 361.
- Nolan v. New York etc. R. Co., 9 Jones & Sp. 541; 2 Abb. N. C. 538. pp. 69, 71, 376.
- Nolan v. Ohio etc. R. Co., 39 Mo. 114. p. 539.
- Nolton v. Western R. Corp., 15 N. Y. 444. pp. 45, 545. (In full, p. 37.)
c 22 N. Y. 307; 66 N. Y. 319; 51 Pa. St. 326; 47 Ind. 481; 37 Mo. 260; 57 Barb. 652; 19 Ohio St. 13; 58 N. Y. 134; 24 N. Y. 188, 193; 20 Minn. 128; 37 Mich. 113, 114; 28 N. J. L. 190.
- Nordemeyer v. Loescher, 1 Hilt. 499. p. 524.
- North Pennsylvania R. Co. v. Heileman, 49 Pa. St. 60; s. c. 1 Thomp. on Neg. 401. p. 233.
c 33 Ind. 359; 34 Iowa, 161; 63 Pa. St. 179; 17 Mich. 118, 120, 121; 21 Minn. 297; 35 N. Y. 44; 49 Cal. 258; 64 Me. 490; 42 N. Y. 473; 25 Mich. 291; 73 Pa. St. 510; 66 Pa. St. 33; 4 Or. 55; 67 Pa. St. 315.
- Northern R. Co. v. Page, 22 Barb. 130. pp. 336, 375.
c 28 Barb. 280; 24 Barb. 517; 4 Hun, 219; 6 Thomp. & C. 497, 498; 46 N. H. 219.
- Northrup v. Railway Passengers' Assur. Co., 43 N. Y. 516. p. 51.
- North-Western R. Co. v. Hack, 66 Ill. 238. pp. 370, 375.
- Norton v. Ittner, 56 Ill. 551. p. 563.
c 58 Mo. 393.
- Norwich Co. v. Wright, 12 Wall. 104. p. 487.
- Noyes v. Smith, 28 Vt. 59. p. 222.
c 49 Texas, 189; 2 Lans. 512; 43 Me. 271; 68 Ill. 552; 49 Barb. 327; 14 Minn. 363; 38 Pa. St. 111; 5 Hun, 33; 46 Mo. 174; 13 Allen, 442; 47 Mo. 587; 60 Miss. 191; 10 Ind. 557; 62 Me. 467; 59 Mo. 504; 22 Ill. 643; 46 Texas, 539; 43 Me. 270; 5 Hun, 494; 8 Hun, 257; 47 Miss. 414, 416; 48 Me. 120, 122; 32 Vt. 478; 49 N. Y. 531; 42 Ala. 714, 718.

O.

- O'Brien v. Boston etc. R. Co., 15 Gray, 20. pp. 30, 43, 339, 340, 369, 376. (In full, p. 22.)
c 104 Mass. 121; 6 Reporter, 490; 47 Iowa, 89; 10 Ch. Leg. N. 78; 38 Ind. 126.
- O'Donnell v. Allegheny etc. R. Co., 59 Pa. St. 239; s. c. 50 Pa. St. 490; 8 Am. L. Reg. (N. s.) 757; 6 Cent. L. J. 401. pp. 49, 262, 332, 345.
c 86 Pa. St. 144; 53 Pa. St. 457; 49 Pa. St. 194; 68 Ill. 552, 553; 50 Miss. 191; 82 Pa. St. 124; 46 Texas, 539; 58 Me. 195. d 64 Mo. 475.
- O'Flaherty v. Union R. Co., 45 Mo. 70. p. 293.
- O'Hagan v. Dillon, 10 Jones & Sp. 456. p. 271.
- Ohio etc. R. Co. v. Applewhite, 52 Ind. 540. p. 66.
c 57 Ind. 579; 6 Cent. L. J. 390; 55 Ind. 372; 60 Ind. 15.
- Ohio etc. R. Co. v. Dickerson, 59 Ind. 317. pp. 234, 571, 572.
- Ohio etc. R. Co. v. Dunbar, 20 Ill. 623. p. 418.
- Ohio etc. R. Co. v. Hatton, 60 Ind. 12; s. c. 6 Cent. L. J. 389. pp. 67, 68.
c 60 Ind. 536.
- Ohio etc. R. Co. v. Muhling, 30 Ill. 9. pp. 49, 234, 334, 340, 376.
c 41 Ala. 502; 36 Mo. 434; 58 Me. 197. d 81 Ill. 249, 250.
- Ohio etc. R. Co. v. Schiebe, 44 Ill. 460. p. 267.
- Ohio etc. R. Co. v. Selby, 47 Ind. 471. pp. 45, 234, 401, 550, 551.
c 37 Mich. 115.
- Ohio etc. R. Co. v. Stratton, 78 Ill. 88; s. c. 3 Cent. L. J. 415. pp. 267, 292.
- Oil Creek etc. R. Co. v. Clark, 72 Pa. St. 231. p. 70.
c 43 Barb. 537; 1 Biss. 415.
- Oliver v. New York etc. R. Co., 1 Edm. Sel. Cas. 589. pp. 201, 208.
- Orange County Bank v. Brown, 9 Wend. 85; s. c. 3 Wend. 158. pp. 491, 498, 511, 520, 521.
c 15 Mich. 127, 131, 142; 30 N. Y. 611, 615,

617, 621; 4 Bosw. 233, 238; 25 Wend. 460; 69 Ill. 67; 9 Humph. 624; Newb. Adm. 496; 42 Wis. 28; 9 Ch. Leg. N. 316; 1 Smed. & M. 303; 23 Vt. 216; 3 Barb. 389, 390; 8 Bush. 474; 14 Pa. St. 132; 2 Bosw. 604; 44 N. H. 230, 231; 52 N. Y. 433; 9 Lower Canada Rep. 78; 11 N. Y. 492, 493; 12 Ga. 225; 42 N. Y. 329; 19 Wend. 236, 245, 258, 265, 270, 271, 537, 540, 541; 6 Hill, 589; 13 Ill. 748, 749; 42 Wis. 28; 44 N. H. 330, 331; 98 Mass. 378; 29 Ind. 361; 7 Am. L. Reg. (N. S.) 535; 6 Blatchf. 66; 11 Humph. 420; 1 E. D. Smith, 98, 99, 100; 6 Cush. 73. ¶ 1 Woolw. 370; 45 Barb. 223; 2 Woodb. & M. 314.

Oriflamme (The), 3 Sawyer, 397; s. c. 1 Sawyer, 176. pp. 469, 572.

Orndorf v. Adams Express Co., 3 Bush, 194. p. 389.

Osborne v. Union Ferry Co., 53 Barb. 629. p. 108.

Ouimit v. Henshaw, 35 Vt. 605. pp. 512, 520, 532.

¶ 27 Iowa, 27; 57 N. Y. 559; 73 Ill. 513; 37 N. Y. Superior Ct. 532; 38 Vt. 416.

P.

Pabst v. Baltimore etc. R. Co., 2 McArthur, 42. pp. 231, 268.

Pacific (The), 1 Blatchf. 569. pp. 29, 464, 467.

Packet Co. v. Clough, 20 Wall. 528. pp. 44, 558.

¶ 2 Mont. 520, 521.

Paducah etc. R. Co. v. Hoehl, 12 Bush, 41. p. 552.

Page v. New York etc. R. Co., 6 Duer, 523. p. 67.

Paine v. Chicago etc. R. Co., 45 Iowa, 569. pp. 571, 575.

Palmer v. Andover, 2 Cush. 600. p. 220.

¶ 1 Allen, 32; 25 Iowa, 110, 111, 112, 114, 115; 13 Hun, 85; 3 Allen, 405; 9 Kan. 558; 53 Mo. 301; 7 Gray, 102, 103, 343; 117 Mass. 710; 10 R. I. 308; 41 N. H. 52, 334; 6 Reporter, 719; 97 Mass. 265; 22 Wis. 679; 43 Ind. 597; 10 Allen, 27; 12 Allen, 261; 44 Barb. 391; 35 Ill. 66; 34 N. H. 188; 51 Me. 140; 35 N. H. 276; 42 N. H. 216. ¶ 29 Wis. 304, 305; 51 Me. 128, 130, 132.

Palmer v. Charlotte etc. R. Co., 3 So. Car. 580. p. 70.

¶ 47 Iowa, 86; 10 Ch. Leg. N. 78. ¶ 48 Vt. 235.

Palmeter v. Wagner, 10 Alb. L. J. 149. p. 532.

Pardee v. Drew, 25 Wend. 459. pp. 7, 511, 521.

¶ 3 Barb. 389, 390; 41 Miss. 679; 15 Mich. 142; 6 Hun, 547; 2 Bosw. 604; 44 N. H. 330, 331; 42 N. Y. 329, 332; 7 Metc. 601; 1 Am. Rail. Cas. 394; 6 Hill, 589; 21 Iowa, 26; 13 Ill. 749; 17 Am. L. Reg. (N. S.) 511; 72 N. Y. 58; 6 Cush. 72; 1 E. D. Smith, 99; 7 Hill, 563; 25 Wend. 459; 24 La. An. 573.

Park v. O'Brien, 23 Conn. 339. p. 552.

¶ 45 How. Pr. 89; 17 Mich. 120, 122; 29 Conn. 209; 14 Minn. 96; 34 N. Y. 14; 21 Md. 294.

Parker v. Adams, 12 Metc. 415; s. c. 1 Thomp. on Neg. 376. p. 551.

¶ 19 Conn. 576; 18 N. Y. 252; 7 Wis. 431; 42 Me. 336; 21 Iowa, 26; 10 Cush. 496, 497; 24 N. J. L. 284; 37 Cal. 422; 21 Ohio St. 593; 52 N. H. 554; 24 Vt. 495; 47 Miss. 421; 6 Gray, 71, 72; 104 Mass. 62; 37 Mo. 552.

Parker v. Erie etc. R. Co., 5 Hun, 57. pp. 344, 367.

Parker v. South-Eastern R. Co., 1 C. P. Div. 618; s. c. 2 C. P. Div. 416; 12 Eng. Law & Eq. 12. p. 519.

¶ 10 Jones & Sp. 363.

Parker v. Union Woollen Co., 42 Conn. 399. p. 220.

Parks v. Ross, 11 How. 372. p. 505.

Parmalee v. Fischer, 22 Ill. 212. p. 510.

Parmalee v. Lowitz, 74 Ill. 116. pp. 26, 525.

Parnaby v. Lancaster Canal Co., 11 Ad. & E. 223; s. c. 3 Nev. & P. 523; 3 Per. & Dav. 162; 1 Thomp. on Neg. 541. pp. 153, 224.

¶ 122 Mass. 366, 367, 373; L. R. 1 C. P. 287; 35 L. J. (C. P.) 189; 11 C. B. (N. S.) 206; 12 Jur. (N. S.) 433, 572, 578; L. R. 1 H. L. 103, 123; 11 H. L. Cas. 701, 727; 35 L. J. (Exch.) 227, 237; 4 Jur. (N. S.) 642; 27 L. J. (Exch.) 324; 7 Hurl. & N. 336, 339; 30 L. J. (Exch.) 332; 8 Jur. (N. S.) 491, 492, 991; 59 N. Y. 32; 7 Reporter, 479; 91 U. S. 551; 5 C. B. 615; 11 Exch. 270; 4 Hurl. & N. 351; 2 Best & S. 117; 31 L. J. (Q. B.) 195; 44 L. J. (Q. B.) 90; L. R. 10 Q. B. 215; L. R. 4 Q. B. 385.

Parsons v. Bedford, 3 Pet. 446. p. 509.

Parsons v. Monteath, 13 Barb. 353. p. 383.

Passenger R. Co. v. Young, 21 Ohio St. 508. pp. 369, 374.

Paterson v. Wallace, 1 Macq. H. L. Cas. 748. p. 562.

¶ 2 Lans. 516; 28 Ind. 31; 7 Hurl. & N. 938;

- 12 Ohio St. 488; 17 Wall. 664; 3 Dill. 325; 49 Barb. 327, 569; 11 Hun. 594; L. R. 7 C. P. 280; 5 Hun. 33; 46 Mo. 170; 3 Hurl. & N. 655; 27 L. J. (Exch.) 406; 67 Me. 107; 50 Miss. 191; 106 Mass. 285; 62 Me. 467; 3 Robt. 84; 28 How. Pr. 475; 36 Pa. St. 304; 24 N. Y. 413, 414, 445; 8 Hun. 258, 259; 5 Kan. 182; 2 Hurl. & N. 732; 57 Me. 131; 25 N. Y. 566, 567; 48 Me. 118; 29 Conn. 560.
- Patten v. Chicago etc. R. Co.*, 32 Wis. 524. pp. 567, 568.
- Patterson v. Burlington etc. R. Co.*, 38 Iowa, 279. p. 552.
 e 45 Iowa, 663, 664; 38 Iowa, 567, 568.
- Patscheider v. Great Western R. Co.*, 26 Week. Rep. 268; s. c. 6 Cent. L. J. 275; 5 Reporter, 781; 3 Exch. Div. 153; 7 Am. L. Reg. (N. S.) 799. pp. 532, 534.
- Patten v. Chicago etc. R. Co.*, 32 Wis. 524. pp. 108, 272.
- Payne v. Chicago etc. R. Co.*, 39 Iowa, 523. p. 294.
- Payne v. Great Northern R. Co.*, 2 Fost. & Fin. 619. p. 206.
- Pearson v. Duane*, 4 Wall. 605; s. c. 6 Am. L. Reg. (N. S.) 631. pp. 30, 303, 464, 465, 524, 568. (In full, p. 17.)
 e 18 Int. Rev. Rec. 55; 11 Blatchf. 237.
- Peck v. Neil*, 3 McLean, 22. pp. 238, 574.
 e 4 Iowa, 548; 27 La. An. 5; 5 N. H. 433.
- Peck v. New York etc. R. Co.*, 70 N. Y. 587. pp. 345, 370, 374, 376.
- Peck v. Weeks*, 34 Conn. 145. p. 386.
- Peck v. North Staffordshire R. Co.*, 10 H. L. Cas. 473. p. 390.
- Peet v. Chicago etc. R. Co.*, 19 Wis. 118. pp. 421, 423.
- Peixotti v. McLaughlin*, 1 Strobh. 468. pp. 26, 520, 521.
- Pendleton v. Kinsley*, 3 Cliff. 416. pp. 365, 369, 470. (In full, p. 352.)
- Peninsular etc. Steam Nav. Co. v. Shand*, 11 Jur. (N. S.) 771; s. c. 13 Week. Rep. 1079; 12 L. T. (N. S.) 808. pp. 525, 526.
 e 35 Upper Canada Q. B. 562; 45 N. Y. 117; 55 Pa. St. 58; L. R. 2 Ad. & E. 396; L. R. 3 C. P. 18; 26 Upper Canada Q. B. 498.
- Pennsylvania Canal Co. v. Bentley*, 66 Pa. St. 30. pp. 552, 563.
 e 11 Ind. 254; 67 Me. 107; 41 Iowa, 231; 72 Pa. St. 141; 48 Cal. 426; 70 Pa. St. 363; 75 Pa. St. 86, 376; 1 Cent. L. J. 374.
- Pennsylvania R. Co. v. Allen*, 53 Pa. St. 276. p. 571.
- Pennsylvania R. Co. v. Books*, 57 Pa. St. 339. pp. 51, 52, 329, 556, 561, 571.
 e 59 Ind. 320; 86 Pa. St. 146; 58 Me. 192; 44 Iowa, 318.
- Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315. pp. 45, 386, 387, 388, 401.
 e 56 Me. 244; 5 Neb. 121; 47 Ind. 486; 17 How. 368, 369, 370; 55 Pa. St. 59; 63 Pa. St. 17; 19 Ohio St. 14; 20 Minn. 130; 39 Iowa, 254.
 d 34 N. J. L. 517.
- Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372. p. 293.
- Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292. pp. 66, 227, 267.
 e 30 Ohio St. 238; 40 Miss. 386; 63 N. Y. 560; 49 N. Y. 53.
- Pennsylvania R. Co. v. McCloskey's Administrator*, 23 Pa. St. 526. pp. 228, 266, 267, 402.
 e 52 Pa. St. 390; 51 Pa. St. 328, 331; 6 Am. L. Reg. 716; 26 Minn. 129; 21 Ind. 52; 2 Cent. L. J. 367; 39 Iowa, 249, 254. d 33 Pa. St. 329; 8 Am. L. Reg. 37.
- Pennsylvania R. Co. v. McTighe*, 46 Pa. St. 316. p. 552.
 e 3 Daly, 382; 15 Wall. 408.
- Pennsylvania R. Co. v. Schwarzenberger*, 45 Pa. St. 208. pp. 437, 525.
- Pennsylvania R. Co. v. Sly*, 65 Pa. St. 205. p. 543.
 e 29 Gratt. 436.
- Pennsylvania R. Co. v. The People*, 31 Ohio St. 537. p. 544.
- Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365. pp. 317, 363, 370, 374, 375.
 e 36 Wis. 464, 675; 11 Nev. 364; 3 Cliff. 429; 57 Me. 215.
- Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157; s. c. 72 Pa. St. 27. p. 552.
 e 5 Reporter, 377; 79 Pa. St. 390.
- Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; s. c. 37 Pa. St. 420; 8 Am. L. Reg. 27. pp. 233, 269, 293.
 e 28 Mich. 455; 56 Pa. St. 297; 39 Md. 348; 53 Pa. St. 457, 459; 100 Mass. 215; 29 Iowa, 38; 44 Pa. St. 178; 13 Ind. 371; 35 Pa. St. 71, 72, 73; 36 Pa. St. 303; 21 Wis. 375; 24 Md. 107; 37 Mich. 215.

- Penton v. Grand Trunk R. Co., 28 Upper Canada Q. B. 367. pp. 532, 534, 536.
- People v. Caryl, 3 Park. Cr. Cas. 326. pp. 303, 336, 375, 465.
- People v. Easton, 13 Abb. Pr. (N. S.) 160. p. 349.
- People v. Jillson, 3 Park. Cr. Cas. 234. pp. 30, 43, 341, 376.
e 7 Hun, 144.
- People v. Wilson, 17 Ill. 137. p. 323.
- Peoria etc. R. Co. v. Thompson, 56 Ill. 138. p. 215.
- Percy v. Millaudon, 8 Mart. (N. S.) 75. p. 179.
- Perkins v. Concord R. Co., 44 N. H. 223. pp. 557, 559.
e 48 N. H. 545.
- Perkins v. Eastern etc. R. Co., 29 Me. 307. p. 552.
- Perkins v. Missouri etc. R. Co., 55 Mo. 202. p. 575.
e 66 Mo. 545, 595; 2 Cent. L. J. 540; 59 Wis. 33.
- Perkins v. New York etc. R. Co., 24 N. Y. 196; s. c. 2 Am. L. Reg. (N. S.) 318. pp. 383, 400, 402.
e 51 Pa. St. 326; 25 N. Y. 444, 446, 453, 455; 32 N. J. L. 413; 34 N. J. L. 516; 17 How. 364; 3 Lans. 108; 21 Ind. 51, 52; 37 Mich. 114; 2 Cent. L. J. 367. ? 37 Ill. 507; 51 Pa. St. 328; 47 Ind. 485; 20 Minn. 128, 129.
- Perkins v. Wright, 37 Ind. 27. pp. 520, 521, 537.
- Peter's Case, 9 Am. L. Rev. 164. pp. 347, 348.
- Peters v. Rylands, 20 Pa. St. 497. pp. 412, 413.
- Petty v. Great Western R. Co., L. R. 5 C. P. 461, note. pp. 231, 268.
e 40 L. J. (Q. B.) 191, 201; L. R. 6 Q. B. 383, 402.
- Phelps v. London etc. R. Co., 19 C. B. (N. S.) 321; s. c. 11 Jur. (N. S.) 652; 34 L. J. (C. P.) 259; 13 Week. Rep. 782; 12 L. T. (N. S.) 496. pp. 506, 511, 512.
e L. R. 6 Q. B. 619; 40 L. J. (Q. B.) 303; 32 Wis. 99; 56 Me. 61; 8 Am. L. Reg. (N. S.) 399.
- Philadelphia etc. R. Co. v. Derby, 14 How. 468. pp. 44, 104, 177, 197, 201, 224, 316, 317, 359, 363, 373, 374, 391, 398, 399, 440, 480, 524. (In full, p. 31.)
e 47 Ind. 485, 487; 30 Ill. 24; 41 Ala. 502; 44 Miss. 492; 33 Wis. 54; 56 Me. 241; 3 Cliff. 424, 425; 17 How. 383; 17 Wall. 374; 16 How. 474; 25 N. Y. 457; 34 N. Y. 516; 51 Pa. St. 325; 36 Wis. 462, 463, 675; 106 Mass. 188; 11 Nev. 364; 2 Am. L. T. 119; 34 Barb. 358; 104 Mass. 120; 7 Bosw. 136; 37 Mo. 260, 546; 44 Ind. 202, 203; 48 N. H. 314; 58 N. Y. 134; 19 Ohio St. 13; 36 Mo. 434; 26 Barb. 645; 6 Am. L. Reg. 715; 24 N. Y. 193; 3 Allen, 21; 5 Duer, 196, 197; 15 Alb. L. J. 62; 20 Minn. 128, 130, 133; 49 Me. 281; 15 Ill. 469; 38 Ind. 126; Chase's Dec. 153; 57 Me. 216; 5 Ind. 342; 37 Mich. 115; 11 Gratt. 712; 57 N. Y. 395; 41 Mo. 508; 39 Iowa, 249, 253; 2 Ben. 552; 4 Ben. 355
- Philadelphia etc. R. Co. v. Hassard, 75 Pa. St. 367. pp. 268, 445.
- Philadelphia etc. R. Co. v. Long, 75 Pa. St. 257. p. 293.
- Philadelphia etc. R. Co. v. Quigley, 21 How. 210. pp. 358, 573.
- Philadelphia etc. R. Co. v. Spearen, 47 Pa. St. 300. p. 562.
e 3 Daly, 335; 33 Ind. 359; 18 Ohio St. 414; 39 Md. 580; 65 Pa. St. 273, 274, 276; 2 Neb. 340; 82 Pa. St. 141; 37 Mo. 294; 69 Pa. St. 215; 33 Iowa, 568.
- Phillips v. Earle, 8 Pick. 182. pp. 498, 528.
- Phillips v. Rensselaer etc. R. Co., 57 Barb. 644; s. c. 49 N. Y. 177. pp. 106, 226, 267, 268.
d 3 N. Y. S. C. (T. & C.) 687.
- Pier v. Finch, 24 Barb. 514. pp. 65, 71.
e 5 Neb. 125; 7 Hun, 673.
- Pickford v. Grand Junction R. Co., 8 Mee. & W. 372. p. 7.
- Pike v. Chicago etc. R. Co., 40 Wis. 583. p. 519.
- Pike v. Polytechnic Institution, 1 Fost. & Fin. 712. p. 153.
e L. R. 5 Q. B. 189; L. R. 4 Q. B. 385.
- Pillow v. Bushnell, 5 Barb. 156. p. 486.
- Pittsburgh etc. R. Co. v. Andrews, 39 Md. 329. pp. 257, 562, 565, 571.
- Pittsburgh etc. R. Co. v. Bingham, 29 Ohio St. 364; s. c. 16 Am. L. Reg. (N. S.) 637. p. 106.
- Pittsburgh etc. R. Co. v. Brigham, 29 Ohio St. 374. p. 105. (In full, p. 101.)

- Pittsburgh etc. R. Co. v. Caldwell, 74 Pa. St. 421. pp. 44, 291, 293, 345, 445.
 c 75 Pa. St. 376; 21 Minn. 214.
- Pittsburgh etc. R. Co. v. Evans, 53 Pa. St. 250. p. 562.
 c 46 Ind. 48; 4 Or. 55; 38 Ind. 306.
- Pittsburgh etc. R. Co. v. Hennigh, 39 Ind. 509. pp. 336, 375.
 c 48 Vt. 235.
- Pittsburgh etc. R. Co. v. Hinds, 53 Pa. St. 512. pp. 303, 304, 315, 317, 345, 362, 364. (In full, p. 295.)
 c 106 Mass. 189; 53 Miss. 220; 36 Wis. 460, 461, 463; 3 Cliff. 428; 3 So. Car. 598; 55 N. Y. 113; 97 Mass. 369; 76 Pa. St. 514; 5 Hun, 526; 36 Wis. 673, 675; 57 Me. 216; 7 Reporter, 461.
- Pittsburgh etc. R. Co. v. Krouse, 30 Ohio St. 222. pp. 51, 267.
- Pittsburgh etc. R. Co. v. McClurg, 56 Pa. St. 294. pp. 257, 270.
 c 16 Am. L. Reg. 666; 121 Mass. 428; 5 Bush, 5; 1 Cent. L. J. 374; 75 Pa. St. 376; 39 Md. 347; 29 Ind. 86; 52 Mo. 259; 64 Pa. St. 229; 63 Pa. St. 17. ? 51 Ill. 340.
- Pittsburgh etc. R. Co. v. Nuzum, 50 Ind. 141; s. c. 2 Cent. L. J. 829. p. 66.
 c 52 Ind. 546; 54 Ind. 579; 6 Cent. L. J. 390; 55 Ind. 372; 60 Ind. 534.
- Pittsburgh etc. R. Co. v. Pillow, 76 Pa. St. 510; s. c. 2 Cent. L. J. 79. pp. 29, 303, 364, 556.
- Pittsburgh etc. R. Co. v. Slusser, 19 Ohio St. 157. pp. 369, 575.
 c 19 Ohio St. 170, 172; 11 Nev. 364; 45 Iowa, 572.
- Pittsburgh etc. R. Co. v. Theobald, 51 Ind. 246. pp. 369, 549, 559.
- Pittsburgh etc. R. Co. v. Thompson, 56 Ill. 138; s. c. 4 Ch. Leg. N. 9. pp. 206, 211, 212, 572, 582.
 c 29 Gratt. 446; 15 Alb. L. J. 62; 4 Col. 10.
- Pittsburgh etc. R. Co. v. Valleley, 32 Ohio St. 345; s. c. 7 Reporter, 406; 6 Cent. L. J. 277. pp. 301, 302, 375.
- Pittsburgh etc. R. Co. v. Vandyne, 57 Ind. 576. pp. 29, 303, 375.
- Pittsburgh etc. R. Co. v. Van Houten, 48 Ind. 90. pp. 301, 375.
 c 57 Ind. 579.
- Pittsburgh etc. R. Co. v. Vining's Administrator, 27 Ind. 513. p. 552.
 c 18 Ohio St. 413; 34 Iowa, 160; 46 Ind. 30; 52 Ind. 111; 40 Ind. 552; 28 Ind. 288; 59 Ind. 92.
- Place v. The City of Norwich, 1 Ben. 89. p. 487.
- Plaster v. Illinois etc. R. Co., 35 Iowa, 449. p. 552.
- Platt v. Forty-second Street etc. R. Co., 4 Thomp. & C. 406. pp. 51, 446.
- Pleasants v. Fant, 22 Wall. 121. pp. 252, 505.
- Pleasants v. North Beach etc. R. Co., 34 Cal. 586. pp. 28, 580.
- Pluckwell v. Wilson, 5 Car. & P. 375. p. 275.
 c 13 Ill. 590; 19 Conn. 511, 572; 2 Cush. 544; 6 Hill, 593; 18 N. Y. 258; 17 Barb. 98; 20 Ill. 491; 2 Woodb. & M. 345; 25 Me. 48; 17 Iowa, 463; 32 Me. 50; 29 N. J. L. 270, 283; 4 N. Y. 360; 12 Metc. 420; 9 Wis. 217; 8 Barb. 395; 2 Bradw. 39; 29 Me. 310; 19 Wend. 401; 13 Barb. 497.
- Plummer v. Webb, 1 Ware, 75. p. 544.
- Pollard v. New York etc. R. Co., 7 Bosw. 437. p. 263.
- Pomeroy v. New York etc. R. Co., 4 Blatchf. 122. p. 543.
- Pope v. Nickerson, 3 Story, 475. p. 176.
- Porter v. Chicago etc. R. Co., 41 Iowa, 358. p. 371.
- Porter v. Hildebrand, 14 Pa. St. 129. pp. 513, 538.
 c 35 Vt. 622; 10 How. Pr. 333; 13 Ill. 750.
- Porter v. New York etc. R. Co., 34 Barb. 353. pp. 341, 342, 376.
 c 15 N. Y. S. C. (T. & C.) 581.
- Porter v. Steamboat New England, 17 Mo. 290. pp. 66, 68, 466, 568, 570.
- Potter v. Chicago etc. R. Co., 22 Wis. 615; s. c. 21 Wis. 372. p. 552.
- Poucher v. New York etc. R. Co., 49 N. Y. 263. pp. 385, 401, 402.
 c 66 N. Y. 317; 17 How. 367. ? 47 Ind. 485.
- Poulin v. Broadway etc. R. Co., 1 Abb. N. C. 549; s. c. 61 N. Y. 621; 2 Jones & Sp. 296. p. 443.
- Poulton v. London etc. R. Co., 36 L. J. (Q. B.) 294; s. c. L. R. 2 Q. B. 534. p. 373.
 c 9 Ohio St. 131; L. R. 6 Q. B. 70; 46 N. Y. 29; Irish Rep. 5 C. L. 9, 18, 24. d 42 L. J. (Q. B.) 25, 27; L. R. 8 Q. B. 40.
- Powell v. Deveny, 3 Cush. 300. p. 220.
 c 59 Ill. 354; 111 Mass. 141; 39 N. J. L. 310;

26 Wis. 280; 4 Gray, 407, 410; 14 Allen, 297; 75 Ill. 98.

Powell v. Layton, 5 Bos. & Pul. 365. p. 542.

e 2 Chit. Rep. 3, 4; 6 Man. & Sel. 389, 391; 34 L. J. (C. P.) 296; 3 Wend. 166.

Powell v. Myers, 26 Wend. 591. pp. 521, 526.

Powell v. Pennsylvania R. Co., 32 Pa. St. 414. p. 386.

Powell v. Pittsburgh etc. R. Co., 25 Ohio St. 70. pp. 69, 71, 376.

Powles v. Hider, 3 El. & Bl. 207; s. c. 2 Jur. (N. s.) 472; 25 L. J. (Q. B.) 331. p. 520.

Præger v. Bristol etc. R. Co., 23 L. T. (N. s.) 366; s. c. 24 L. T. (N. s.) 105. pp. 231, 268.

e Irish Rep. 7 C. L. 45; 2 Q. B. Div. 88; L. R. 7 C. P. 323, 326; 41 L. J. (C. P.) 141.

Prendergast v. Compton, 8 Car. & P. 454. pp. 20, 365, 469.

e 4 Wall. 615.

Prideaux v. Mineral Point, 43 Wis. 513; s. c. 6 Cent. L. J. 430. pp. 294, 552.

e 43 Wis. 675.

Prentiss v. Boston, 112 Mass. 43. p. 551.

e 120 Mass. 266.

Priest v. Hudson etc. R. Co., 40 How. Pr. 456. p. 368.

Proctor v. Jennings, 6 Nev. 83. p. 220.

Pullman etc. Co. v. Reed, 75 Ill. 125. pp. 338, 376, 575, 577.

e 37 Mich. 346.

Pullman etc. Co. v. Smith, 73 Ill. 360; s. c. 5 Cent. L. J. 54; 15 Am. L. Reg. (N. s.) 95; 7 Ch. Leg. N. 237. p. 531.

e 118 Mass. 277.

Puterbaugh v. Reasor, 8 Ohio St. 484. p. 284.

Putnam v. Broadway etc. R. Co., 55 N. Y. 108. pp. 303, 304, 364.

e 66 N. Y. 644; 70 N. Y. 589; 68 N. Y. 310; 17 Am. L. Reg. (N. s.) 512; 5 Hun, 526; 72 N. Y. 59; 6 Reporter, 55; 7 Reporter, 461; 9 Hun, 173.

Putnam v. Wood, 3 Mass. 481. pp. 115, 357.

Pym v. Great Northern R. Co., 2 Fost. & Fin. 619. pp. 139, 199.

e 5 Pa. St. 324; 8 Best & S. 393; 36 L. J. (Q. B.) 190; Irish Rep. 6 C. L. 255.

Q.

Quarman v. Burnett, 6 Mee. & W. 599. p. 285.

Quigley v. Central Pacific R. Co., 11 Nev. 350. pp. 364, 369, 571, 575, 576, 578.

Quimby v. Vanderbilt, 17 N. Y. 306. pp. 65, 432, 437. (In full, p. 423.)

e 45 N. Y. 189; 7 Lans. 64, 65; 56 Me. 240; 7 Hun, 142; 4 Bosw. 234; 12 Wall. 85; 29 Barb. 56; 4 Abb. App. Dec. 524; 28 N. Y. 217; 46 N. H. 219; 52 N. H. 599; 54 N. Y. 515; 31 N. Y. 666, 669, 672.

R.

R. E. Lee (The), 2 Abb. C. C. 49. p. 518.

Railroad Co. v. Aspell, 23 Pa. St. 147. pp. 227, 228, 267. (In full, p. 252.)

e 44 Miss. 485, 487; 52 Pa. St. 390; 64 Pa. St. 230; 24 Ga. 366; 9 La. An. 442; 48 N. H. 315. d 32 Pa. St. 296; 49 N. Y. 53.

Railroad Co. v. Barron, 5 Wall. 90. p. 550.

e 9 Cent. L. J. 132; 38 Wis. 625; 53 Ind. 157; 22 Wis. 617; 13 Hun, 75; 6 Nev. 234.

Railroad Co. v. Brown, 18 Wall. 445. p. 349.

e 13 Hun, 75.

Railroad Co. v. Gladmon, 15 Wall. 401. p. 553.

e 71 Ill. 607; 3 Dill. 325; 21 Minn. 297; 115 Mass. 200; 3 Col. 129; 15 Alb. L. J. 63; 39 Md. 576; 53 Ala. 80; 14 Kan. 51; 3 Sawyer, 446; 74 N. C. 660; 17 Wall. 600; 46 Iowa, 233; 56 Ind. 529; 2 Col. 154; 7 Cent. L. J. 313; 5 Reporter, 708; 60 N. Y. 335.

Railroad Co. v. Harris, 12 Wall. 85. p. 543.

e 29 Gratt. 435.

Railroad Co. v. Houston, 95 U. S. 697; s. c. 6 Cent. L. J. 132. p. 233.

Railroad Co. v. Jones, 95 U. S. 655. p. 265. (In full, p. 248.)

Railroad Co. v. Mitchell, 11 Heisk. 400. pp. 212, 214.

Railroad Co. v. Lockwood, 17 Wall. 357; s. c. 13 Am. L. Reg. (N. s.) 326; 6 Ch. Leg. N. 77. pp. 45, 400, 401, 484.

(In full, p. 378.)

e 47 Ind. 484, 487, 493; 5 Neb. 122; 15 Alb. L. J. 62; 95 U. S. 658; 43 Conn. 340; 20 Minn. 131; 10 Ch. Leg. N. 380; 4 Cent. L. J. 37; 93 U.

- S. 181, 183; 14 Am. L. Reg. 34; 15 Alb. L. J. 190; 23 Ohio St. 441.
- Railroad Co. v. Pollard, 22 Wall. 348; s. c. 15 Am. L. Reg. (N. S.) 190. pp. 211, 212, 263.
e 2 Mont. 523.
- Railroad Co. v. Stout, 17 Wall. 657. p. 563.
- Railway Co. v. Stevens, 95 U. S. 655. pp. 45, 399, 400, 401.
- Railway Co. v. Whitton, 12 Wall. 270. p. 544.
- Ralston v. Str. State Rights, Crabbe, 46. p. 362.
- Ramsden v. Boston etc. R. Co., 104 Mass. 107. pp. 366, 374, 440.
e 36 Wis. 675; 47 N. Y. 277; 38 Ind. 125.
- Ransom v. New York etc. R. Co., 15 N. Y. 415. pp. 194, 196, 571.
e 48 N. H. 545; 63 Barb. 267; 2 Ben. 239; 23 N. Y. 225; 18 N. Y. 542, 545; 48 N. Y. 211; 42 Miss. 629; 6 Nev. 238. ? 6 Nev. 235.
- Rathel v. Brady, 44 Ind. 412. p. 558.
- Rauch v. Lloyd, 31 Pa. St. 358. p. 298.
- Rawson v. Pennsylvania R. Co., 2 Abb. Pr. (N. S.) 220; s. c. 48 N. Y. 212. pp. 65, 526, 527, 538, 547.
e 7 Hun, 142; 7 Ben. 451; 52 N. H. 599; 54 N. Y. 515.
- Redhead v. Midland R. Co., 8 Best & S. 371; s. c. 2 Q. B. 412; 36 L. J. (Q. B.) 181; 15 Week. Rep. 831; 16 L. T. (N. S.) 485; L. R. 4 Q. B. 379. pp. 199, 208, 357. (In full, p. 124.)
e 119 Mass. 413; 3 Cliff. 422; 44 N. Y. 481; 64 Pa. St. 229; 97 Mass. 368; 58 N. Y. 139; L. R. 8 Exch. 146; 42 L. J. (Exch.) 97; L. R. 5 Q. B. 192, 193, 194, 503, 504, 507, 513; L. R. 5 C. P. 443; 52 N. H. 600.
- Reed v. New York etc. R. Co., 45 N. Y. 574. p. 560.
- Reedie v. London etc. R. Co., 4 Exch. 244. p. 285.
- Regina v. Fanenf, 5 Lower Canada Jur. 167. p. 376.
- Regina v. Frere, 4 El. & Bl. 598; s. c. 1 Jur. (N. S.) 700; 24 L. J. (M. C.) 68. p. 337.
e Irish Rep. 3 C. L. 526.
- Relff v. Kapp, 3 Watts & S. 21. p. 523.
- Revenge (The), 8 Wash. 267. p. 362.
- Rex v. Robinson, 2 Burr. 803. p. 482.
- Reynolds v. Hindman, 32 Iowa, 146. p. 552.
e 38 Iowa, 122, 123, 280, 297; 34 Iowa, 157, 279; 37 Iowa, 322.
- Rice v. Nickerson, 9 Allen, 478. p. 547.
- Richards v. London etc. R. Co., 7 C. B. 839; s. c. 6 Eng. Rail. Cas. 49; 13 Jur. 986; 18 L. J. (C. P.) 251; 3 Am. L. Reg. 694. pp. 518, 532.
e 3 C. P. Div. 226; 18 Alb. L. J. 33; 3 Exch. Div. 156; 19 Wis. 42; 35 Vt. 620; 41 Ala. 504; 15 Mich. 135; L. R. 6 C. P. 50; 40 L. J. (C. P.) 12; 1 Exch. Div. 222; 16 C. B. 22, 23; 24 L. J. (C. P.) 139, 140; 1 Jur. (N. S.) 423, 429; 3 Am. L. Reg. 696, 697; L. R. 6 C. P. 50. ¶ 15 Mich. 145; 27 L. J. (C. P.) 310; 23 Upper Canada Q. B. 380; 10 Jur. (N. S.) 806; 3 Hurl. & Colt 138, 139; 33 L. J. (Exch.) 201.
- Richards v. Westcott, 2 Bosw. 589. pp. 26, 511, 525, 544, 555.
- Richardson v. Boston, 19 How. 259. p. 505.
- Richardson v. Great Eastern R. Co., L. R. 10 C. P. 490; s. c. 33 L. T. (N. S.) 248. pp. 206, 207, 217, 218.
- Richardson v. Great Eastern R. Co., 1 C. P. Div. 342. p. 208.
- Richardson v. Metropolitan R. Co., 37 L. J. (C. P.) 300. p. 264.
e L. R. 4 C. P. 621.
- Riest v. Goshen, 42 Ind. 339. p. 552.
- Rigby v. Hewitt, 5 Exch. 240; s. c. 19 L. J. (Exch.) 291. p. 285.
e 39 Md. 143; 18 Ohio St. 410; 59 Ill. 351, 352; 14 Allen, 293; 20 Iowa, 224; 51 Me. 441, 442; 46 Pa. St. 161. ? 4 Am. L. Reg. (N. S.) 18.
- Rigg v. Manchester etc. R. Co., 12 Jur. (N. S.) 525; 14 Week. Rep. 834. p. 105.
- Riley v. Horne, 5 Bing. 217. pp. 128, 132, 137, 493, 494.
- Ripley v. New Jersey etc. Transp. Co., 31 N. J. L. 388. pp. 69, 336.
e 7 Phila. 14.
- Robbins v. Jones, 15 C. B. (N. S.) 221; s. c. 23 L. J. (C. P.) 1; 12 Week. Rep. 248; 9 L. T. (N. S.) 523. p. 82.
e L. R. 2 C. P. 375; 36 L. J. (C. P.) 193; L. R. 1 C. P. 55.
- Roberts v. Boston, 5 Cush. 198. p. 349.
- Roberts v. Graham, 6 Wall. 578. pp. 550, 554.

Roberts v. Johnson, 58 N. Y. 614. pp. 211, 227.

Robertson v. New York etc. R. Co., 22 Barb. 91. pp. 265, 329, 556.
 e 64 Mo. 474; 8 Kan. 517; 5 Ch. Leg. N. 83; 57 N. Y. 390, 396.

Robinson v. Dunmore, 2 Bos. & Pul. 417. pp. 451, 452, 491, 516.

Robinson v. Fitchburg etc. R. Co., 7 Gray, 92. p. 551.
 e 1 Allen, 189, 190; 109 Mass. 127; 38 Ind. 314, 315; 46 N. H. 26; 2 Mont. 520; 44 N. H. 333.

Robinson v. New York etc. R. Co., 66 N. Y. 11; s. c. 65 Barb. 146. pp. 294, 553.

Robinson v. Pioche, 5 Cal. 460. p. 271.

Robinson v. Western Pacific R. Co., 48 Cal. 409. p. 552.
 e 50 Cal. 484.

Robson v. North-Eastern R. Co., L. R. 10 Q. B. 271; 44 L. J. (Q. B.) 112; 23 Week. Rep. 791; 32 L. T. (N. s.) 551; 2 Q. B. Div. 85. pp. 229, 232, 233, 268.
 e 3 App. Cas. 209; 2 Exch. Div. 252.

Roe v. Birkenhead etc. R. Co., 7 Exch. 36; s. c. 20 L. J. (Exch.) 1; 21 L. J. (Exch.) 9; 7 Eng. Law & Eq. 246; 6 Eng. Rail. Cas. 795. p. 373.
 e 57 Me. 246; 30 L. J. (Exch.) 191, 192; 6 Hurl. & N. 365; 15 Upper Canada C. P. 439; Irish Rep. 1 C. L. 146; 30 L. J. (Q. B.) 151, 152; 3 El. & El. 679, 683.

Rose v. Des Moines Valley R. Co., 39 Iowa, 246. pp. 44, 399.

Ross v. Hill, 2 C. B. 877; s. c. 3 Dow. & L. 788; 10 Jur. 435; 15 L. J. (C. P.) 182. pp. 406, 451, 550.

Ross v. Missouri etc. R. Co., 4 Mo. App. 582. pp. 511, 534.

Roth v. Buffalo etc. R. Co., 34 N. Y. 348. pp. 534, 535.
 e 27 Iowa, 27; 8 Bush, 187; 45 N. Y. 187; 49 Barb. 154; 73 Ill. 513, 515; 18 Minn. 143; 50 Barb. 205; 56 Barb. 191; 37 N. Y. Superior Ct. 532; 31 Ind. 23; 44 N. Y. 511. d 57 N. Y. 599.

Rounds v. Delaware etc. R. Co., 64 N. Y. 129; s. c. 3 Hun, 329; 5 N. Y. S. C. (T. & C.) 475. pp. 367, 368, 374, 375.
 e 70 N. Y. 591; 13 Hun, 74; 18 Alb. L. J. 91; 6 Reporter, 404; 12 Hun, 438, 468.

Ruckers (The), 4 Rob. 73. p. 460.

Rumsey v. North-Eastern R. Co., 14 C. B. (N. s.) 641; s. c. 32 L. J. (C. P.) 244; 14 Week. Rep. 911; 8 L. T. (N. s.) 666; 10 Jur. (N. s.) 203. pp. 524, 529.
 e 15 Upper Canada C. P. 436.

Rusch v. Davenport, 6 Iowa, 443. p. 552.
 e 16 Iowa, 346; 32 Iowa, 327; 17 Mich. 118; 29 Iowa, 47; 44 Iowa, 675; 21 Iowa, 414; 38 Iowa, 567; 26 Iowa, 268; 4 Or. 55; 54 Miss. 395; 9 Iowa, 203.

Russell v. Hudson River R. Co., 17 N. Y. 134. p. 48.
 e 18 N. Y. 433; 53 Pa. St. 457; 12 Ohio St. 495; 49 Barb. 326; 14 Minn. 364; 38 Pa. St. 111; 10 Allen, 238; 11 Kan. 93; 6 Reporter, 126; 46 Texas, 539; 76 Ill. 398; 16 N. Y. 165, 167; 5 Neb. 497; 18 Ind. 230; 25 N. Y. 565, 567; 44 Cal. 82; 30 Barb. 235; 86 Pa. St. 440; 8 Kan. 517.

Ryall v. Kennedy, 8 Jones & Sp. 347. p. 544.

Ryan v. Cumberland etc. R. Co., 23 Pa. St. 384. p. 47.
 e 63 Pa. St. 151; 53 Ga. 16; 53 Pa. St. 457; 38 Pa. St. 110; 21 Ill. 26; 3 Sawyer, 441; 6 Reporter, 126; 49 Miss. 283; 20 Md. 221, 222; 59 Pa. St. 246, 247; 28 Ind. 377; 46 Texas, 539, 550; 27 Md. 601; 76 Ill. 397; 32 Md. 418; 44 Cal. 82; 42 Ala. 719; 86 Pa. St. 440.

Ryan v. Hudson etc. R. Co., 1 Jones & Sp. 137. p. 553.

Ryland v. Peters, 5 Phila. 264. p. 291.

S.

Sabin v. Vermont etc. R. Co., 25 Vt. 363. p. 545.

Safford v. Drew, 3 Duer, 627. p. 549.
 e 29 Gratt. 439; 26 Ill. 403.

Sager v. Portsmouth, 31 Me. 228. p. 388.

Sales v. Western Stage Co., 4 Iowa, 547. p. 200.

Saltonstall v. Stockton, Taney's Dec. 11; s. c. 13 Pet. 187. pp. 28, 544, 562.

Sampson v. Coy, 15 Mass. 493. p. 550.

Sanford v. Catawissa etc. R. Co., 2 Phila. 107. p. 28.

Sanford v. Eighth Avenue etc. R. Co., 23 N. Y. 343; s. c. 7 Bosw. 122. pp. 362, 367, 374, 443.
 e 3 Cliff. 428; 64 N. Y. 138; 5 Daly, 223, 224;

- 3 Jones & Sp. 123; 46 N. Y. 28; 66 N. Y. 457; 4 Hun, 684; 46 N. H. 223. ? 36 Wis. 576.
- Satterlee v. Groat, 1 Wend. 272. p. 452.
- Sauvinet v. Walker, 27 La. An. 14. p. 347.
- Sawyer v. Burlington etc. R. Co., 27 Vt. 377. pp. 101, 417.
- Sawyer v. Dulany, 30 Texas, 479. p. 544.
- Sawyer v. Hannibal etc. R. Co., 37 Mo. 240. pp. 199, 208, 210, 211, 582.
- Sawyer v. Sauer, 10 Kan. 466. p. 239.
- Schechardt v. Allens, 1 Wall. 369. p. 505.
- School District v. Boston etc. R. Co., 102 Mass. 552. p. 388.
- Schopman v. Boston etc. R. Co., 9 Cush. 24. pp. 417, 434.
- c 56 Me. 240; 46 N. H. 220, 221; 8 Allen, 233.
- Schuerman v. Missouri R. Co., 3 Mo. App. 565. p. 552.
- Scott v. Dublin etc. R. Co., Irish Rep. 11 C. L. 377. pp. 231, 266.
- c 24 Upper Canada Q. B. 106.
- Sears v. Eastern R. Co., 14 Allen, 433. p. 68.
- c 63 Me. 301; 42 N. H. 604.
- Seabrook v. Hecker, 2 Robt^d 291. p. 562.
- Seaver v. Boston etc. R. Co., 14 Gray, 466. p. 48.
- c 102 Mass. 584; 49 Barb. 326; 14 Minn. 364; 46 Mo. 169; 10 Allen, 237, 238; 55 Ind. 49; 11 Kan. 93; 59 Pa. St. 251; 8 Allen, 446; 3 Col. 510; 119 Mass. 421; 41 Ala. 717; 8 Kan. 517.
- Seger v. Burkhamsted, 22 Conn. 290. p. 571.
- c 33 Conn. 55; 27 Conn. 300; 44 Iowa, 322; 48 N. H. 545; 6 Nev. 231, 233.
- Seigel v. Eisen, 41 Cal. 109. pp. 220, 259, 445.
- Semler v. Commissioners of Emigration, 1 Hilt. 244. pp. 28, 520.
- c 3 Daly, 393.
- Senecal v. Richelieu Co., 15 Lower Canada Jur. 1. pp. 511, 515.
- Seymour v. Chicago etc. R. Co., 3 Biss. 43. pp. 110, 201, 412, 413, 572, 575.
- Seymour v. Greenwood, 6 Hurl. & N. 359; s. c. 30 L. J. (Exch.) 189; 9 Week. Rep. 518 (affirmed on appeal, 30 L. J. (Exch.) 327; 7 Hurl. & N. 359; 9 Week. Rep. 785; 4 L. T. (N. s.) 833). pp. 301, 363, 373, 374.
- c 3 Cliff. 429; 21 Ohio St. 524; L. R. 8 C. P. 154; 42 L. J. (C. P.) 78; L. R. 2 Q. B. 536, 539; 36 Wis. 675; 46 N. Y. 29; Irish Rep. 5 C. L. 17, 18; L. R. 3 C. P. 643; 57 Me. 215; 56 N. Y. 200; 47 N. Y. 126; 15 Upper Canada C. P. 438; L. R. 5 C. P. 643; 12 Allen, 55. d L. R. 2 Q. B. 539.
- Sharp v. Gray, 9 Bing. 457; s. c. 2 Moo. & S. 621. pp. 115, 116, 117, 120, 121, 126, 127, 130, 131, 134, 135, 138, 146, 147, 154, 155, 158, 198, 199, 236, 238, 355, 453.
- c 3 Cliff. 420; 26 N. Y. 104; 44 N. Y. 488; 48 N. H. 313; 8 Best & S. 379, 385, 386, 391, 402, 403; L. R. 2 Q. B. 419, 424, 425, 429, 438, 439; 36 L. J. (Q. B.) 185, 187, 190, 195; 13 Wend. 627; 13 Vt. 327; 4 Gill, 421; L. R. 5 Q. B. 195, 512; 13 Conn. 327; 6 Barb. 357; 23 N. H. 284. d L. R. 4 Q. B. 387, 392; 9 Mete. 7, 12. ? 21 Md. 301; 44 N. Y. 481, 482.
- Shaw v. New York etc. R. Co., 6 Eng. Rail. Cas. 87; s. c. 13 Q. B. 347. p. 528.
- Shea v. Sixth Avenue R. Co., 62 N. Y. 180; s. c. 1 Abb. N. C. 550; 5 Daly, 221. pp. 367, 447.
- c 37 Mich. 213.
- Shedd v. Troy etc. R. Co., 40 Vt. 88. pp. 71, 376.
- c 67 Me. 165; 17 Alb. L. J. 367; 6 Cent. L. J. 382; 54 N. Y. 516.
- Sheerman v. Toronto etc. R. Co., 34 Upper Canada Q. B. 451. p. 49.
- Shelton v. Lake Shore etc. R. Co., 29 Ohio St. 214. pp. 338, 339, 376.
- c 37 Mich. 346.
- Shepherd v. Midland R. Co., 20 Week. Rep. 705; s. c. 25 L. T. (N. s.) 879. p. 110.
- Sheridan v. Brooklyn etc. R. Co., 36 N. Y. 39. pp. 261, 270, 291.
- c 38 N. Y. 262.
- Sherley v. Billings, 8 Bush, 147. pp. 304, 317, 364, 365, 369, 557, 571, 581.
- c 36 Wis. 464, 675.
- Sherlock v. Alling, 93 U. S. 99; s. c. 44 Ind. 184. pp. 481, 544, 556.
- c 95 U. S. 487.
- Sherman v. Chicago etc. R. Co., 40 Iowa, 45. pp. 69, 71, 376.
- Shiells v. Blackburne, 1 H. Black. 158. pp. 41, 178.

- Ship Anglo-Norman, 4 Sawyer, 185. p. 473.
- Shoemaker v. Kingsbury, 12 Wall. 369. p. 27.
c 33 Wis. 63.
- Silva v. Low, 1 Johns. Cas. 184. p. 357.
- Simmons v. New Bedford etc. Steamboat Co., 97 Mass. 361; s. c. 100 Mass. 34. pp. 266, 356, 357, 560, 562.
- Simson v. London etc. Omnibus Co., 42 L. J. (C. P.) 112; s. c. 21 Week. Rep. 595; L. R. 8 C. P. 390; 28 L. T. (N. s.) 560; L. R. 6 Q. B. 377. p. 211.
- Siner v. Great Western R. Co., L. R. 3 Exch. 150; s. c. L. R. 4 Exch. 117; 37 L. J. (Exch.) 98; 17 Week. Rep. 417. pp. 229, 233, 268.
c 40 L. J. (Q. B.) 191, 192; L. R. 6 Q. B. 382, 384, 385; 28 Mich. 483; 49 N. Y. 54. d L. R. 4 C. P. 741; Irish Rep. 7 C. L. 47, 48; 44 Miss. 486; 2 Q. B. Div. 87, 88, 89; L. R. 7 C. P. 325; 41 L. J. (C. P.) 325. * 24 Wis. 586.
- Skinner v. London etc. R. Co., 2 Eng. Law & Eq. 360; s. c. 5 Exch. 787; 15 Jur. 299. pp. 137, 207, 211, 212.
c 28 L. J. (Exch.) 4; 8 Best & S. 389; L. R. 2 Q. B. 427; 36 L. J. (Q. B.) 189; 9 Jur. (N. s.) 341; 1 Moo. P. C. C. 11; 1 Duer, 584.
- Slaughter-House Cases, 16 Wall. 36. p. 347.
- Sleath v. Wilson, 9 Car. & P. 607. pp. 35, 359.
- Slimmer v. Merry, 23 Iowa, 90. p. 26.
- Sloman v. Great Western R. Co., 67 N. Y. 208; s. c. 6 Hun, 546; 3 Abb. N. C. 572. pp. 522, 537.
- Smith v. Boston etc. R. Co., 44 N. H. 325; s. c. 3 Am. L. Reg. (N. s.) 127. pp. 511, 521.
c 6 Hun, 547; 56 Me. 62; 8 Am. L. Reg. (N. s.) 399; 98 Mass. 387; 46 N. H. 220, 221.
- Smith v. Brown, L. R. 6 Q. B. 729. p. 544.
- Smith v. Great Eastern R. Co., L. R. 2 C. P. 4; s. c. 36 L. J. (C. P.) 22; 15 Week. Rep. 131; 15 L. T. (N. s.) 246. p. 105.
- Smith v. Hestonville etc. R. Co., 10 Cent. L. J. 272. pp. 292, 445.
- Smith v. Horne, 8 Taun. 144. p. 495.
- Smith v. London etc. Docks Co., L. R. 3 C. P. 326. p. 473.
c 57 N. Y. 387; 62 Me. 563; 41 N. Y. 536; 59 N. Y. 32; 35 N. J. L. 25; 4 Hun, 163.
- Smith v. New York etc. R. Co., 24 N. Y. 222. pp. 45, 384, 401.
- Smith v. O'Connor, 48 Pa. St. 218. p. 293.
- Smith v. Pittsburgh etc. R. Co., 23 Ohio St. 10. p. 571.
c 44 Iowa, 321; 11 Nev. 371.
- Smith v. Smith, 2 Pick. 621. pp. 284, 551.
c 21 Pick. 147; 19 Conn. 576; 10 Mete. 365; 18 N. Y. 252; 4 Gray, 180; 11 Me. 337; 20 Ill. 490; 8 Gray, 132; 5 Duer, 25; 25 Me. 47; 25 Ind. 197; 46 Pa. St. 161, 163; 4 Am. L. Reg. (N. s.) 19; 14 Gray, 251; 11 Mete. 444; 17 Iowa, 463; 6 Iowa, 452; 7 Pick. 190; 3 Fla. 26; 32 Me. 52; 24 N. J. L. 270, 283, 285; 2 Hilt. 39; 4 N. Y. 360; 12 Mete. 417; 43 Wis. 527; 6 Cent. L. J. 430; 12 Pick. 117; 35 Ind. 466; 33 N. J. L. 439; 35 N. H. 276; 2 Cush. 605.
- Smith v. Steele, L. R. 10 Q. B. 125; s. c. 44 L. J. (Q. B.) 60. p. 49.
- Smith v. Wilson, 31 How. Pr. 272. pp. 303, 470.
- Smoot v. Wetumpka, 24 Ala. 112. pp. 552, 553.
c 33 Ala. 130, 132; 32 Iowa, 328; 4 Mich. 562; 45 Ala. 184; 21 Mich. 122; 122 Mass. 378; 21 Iowa, 414; 91 U. S. 551; 48 Cal. 426; 26 Iowa, 268; 1 Black, 53; 36 Ala. 367; 17 Ill. 146; 53 Ala. 529; 51 Ala. 145, 148.
- Snow v. Eastern R. Co., 12 Mete. 44. p. 538.
c 11 Humph. 422; 1 Hilt. 232.
- Southcote's Case, 4 Burr. 2301. p. 499.
- Southcote v. Stanley, 1 Hurl. & N. 247; s. c. 25 L. J. (Exch.) 399. p. 79.
c 53 Pa. St. 459; 5 C. B. (N. s.) 565; 4 Jur. (N. s.) 513; 27 L. J. (C. P.) 321; El. Bl. & El. 170; L. R. 1 C. P. 286; 35 L. J. (C. P.) 189; 12 Jur. (N. s.) 433; 41 N. Y. 532, 533; L. R. 6 Exch. 77; 40 L. J. (Exch.) 45; 25 Mich. 7; 58 Ind. 126; 40 L. J. (Q. B.) 80; L. R. 6 Q. B. 76.
- Southern Express Co. v. Crook, 44 Ala. 468. p. 389.
- Southern Express Co. v. Moon, 39 Miss. 822. p. 389.
- Southern R. Co. v. Kendrick, 40 Miss. 374. pp. 66, 226, 557, 575, 576.
c 44 Miss. 490, 491, 492; 50 Miss. 319. d 44 Miss. 495.

- South-Western R. Co. v. Bently, 51 Ga. 311. p. 524.
- South-Western R. Co. v. Paulk, 24 Ga. 356. pp. 267, 547.
- Spear v. Richardson, 37 N. H. 23. p. 559.
- Spencer v. Campbell, 9 Watts & S. 32. p. 332.
 c 26 Pa. St. 120; 51 N. Y. 490; 51 Me. 338.
- Spencer v. Milwaukee etc. R. Co., 17 Wis. 487. p. 258.
 c 39 Md. 351; 51 Ill. 338, 341.
- Spencer v. Utica etc. R. Co., 5 Barb. 337. p. 553.
- Spooner v. Brooklyn etc. R. Co., 36 Barb. 217. pp. 260, 291.
 c 8 Hun, 498; 67 N. Y. 597.
- Sprague v. Hartford etc. R. Co., 5 R. I. 233. p. 543.
- Sprague v. Smith, 29 Vt. 421. pp. 412, 414.
 c 50 Me. 240; 49 N. H. 34.
- Squire v. Central Park etc. R. Co., 4 Jones & Sp. 436. p. 553.
 c 50 How. Pr. 128; 8 Jones & Sp. 182.
- Stallard v. Great Western R. Co., 2 Best & S. 419; s. c. 8 Jur. (N. s.) 1076; 31 L. J. (Q. B.) 137; 10 Week. Rep. 488; 6 L. T. (N. s.) 217. p. 519.
- St. Amand v. Lizardi, 4 La. 243. pp. 365, 469.
- Standish v. Narragansett Steamship Co., 111 Mass. 512. p. 341.
 c 48 Vt. 235.
- Stanton v. Bell, 2 Hawks, 145. p. 179.
- State v. Campbell, 32 N. J. L. 309. pp. 71, 336, 340, 375, 376.
 c 67 Me. 165; 17 Alb. L. J. 367; 6 Cent. L. J. 382.
- State v. Chovin, 7 Iowa, 204. pp. 341, 376.
 c 45 Iowa, 572; 15 Minn. 56; 46 N. H. 219.
- State v. Davidson, 30 Vt. 377. p. 557.
- State v. Duffy, 7 Nev. 342. p. 349.
- State v. Goold, 53 Me. 279. p. 329.
 c 15 N. Y. S. C. (T. & C.) 580, 582; 45 Md. 352; 7 Phila. 13; 58 Me. 192.
- State v. Grand Trunk R. Co., 58 Me. 176. p. 234.
- State v. McCann, 21 Ohio St. 198. p. 349.
- State v. Overton, 24 N. J. L. 435. pp. 65, 70, 313, 315, 345, 377.
 c 6 Reporter, 490; 47 Iowa, 86; 10 Ch. Leg. N. 78; 17 Pa. St. 436, 437; 5 Daly, 51; 55 Ill. 189; 34 Md. 536; 46 N. H. 219, 220. ? 36 Wis. 459, 460; 7 Iowa, 210.
- State v. Railroad Co., 52 N. H. 529. p. 563.
- State v. Ross, 26 N. J. L. 224. pp. 301, 303, 375.
 c 33 Iowa, 567.
- State v. Thompson, 20 N. H. 250. pp. 336, 375.
 c 76 Pa. St. 74.
- State of New York (The), 7 Ben. 450. pp. 538, 547.
- Steamboat Co. v. Chase, 16 Wall. 522. p. 544.
- Steamboat New World v. King, 16 How. 469. pp. 44, 104, 197, 205, 207, 224, 359, 391, 398, 399, 480. (In full, p. 175.)
 c 20 La. An. 303; 1 Cliff. 326; 24 La. An. 167; 47 Ind. 485, 487; 17 How. 383; 91 U. S. 494; 17 Wall. 374; 51 Pa. St. 325; 3 Cliff. 425; McAll. 107; 41 Ala. 502; 44 Miss. 490; 25 N. Y. 457; 28 Vt. 185; 34 N. J. L. 516; 2 Am. L. T. 119; 48 N. H. 313, 314; 58 N. Y. 134; 19 Ohio St. 13; 1 Cin. Superior Ct. 55; 6 Ben. 371; 24 N. Y. 186, 188, 189, 193; 26 Barb. 645, 646; 6 Am. L. Reg. 715, 716; 3 E. D. Smith, 333; 3 Allen, 21; 37 Mo. 546; 15 Alb. L. J. 62; 20 Minn. 128, 130, 133; 37 Mich. 115; 49 Me. 281; 5 Leg. Gaz. 413; 39 Iowa, 249, 250; 1 Chase's Dec. 151. ? 64 Mo. 447.
- Steele v. Townsend, 37 Ala. 247. pp. 389, 393.
- Steers v. Liverpool etc. Steam Co., 57 N. Y. 1. pp. 527, 539.
- Stephen v. Smith, 29 Vt. 160. pp. 25, 316, 317, 341, 579.
 c 36 Wis. 462, 463, 673; 15 N. Y. S. C. (T. & C.) 580; 15 Gray, 24; 53 Me. 283.
- Stevens v. Armstrong, 6 N. Y. 435. p. 173.
- Stewart v. London etc. R. Co., 3 Hurl. & Colt. 135; s. c. 10 Jur. (N. s.) 805; 33 L. J. (Exch.) 199; 12 Week. Rep. 689; 10 L. T. (N. s.) 302. p. 528.
 c L. R. 6 C. P. 51; 15 Upper Canada C. P. 436; 40 L. J. (C. P.) 12; Irish Rep. 9 C. L. 112, 113; 2 Q. B. Div. 429; Irish Rep. 3 C. L. 580.
- Stiles v. Geesey, 71 Pa. St. 439. p. 284.

- Stiles v. Western R. Co.*, 8 Metc. 44. p. 558.
- Stillson v. Hannibal etc. R. Co.*, 67 Mo. 671; s. c. 7 Cent. L. J. 107. p. 292.
- Stimpson v. Connecticut etc. R. Co.*, 98 Mass. 83. pp. 511, 539. c 16 Hun, 547.
- Stinson v. New York etc. R. Co.*, 32 N. Y. 337. pp. 386, 401, 402.
- St. Louis etc. R. Co. v. Dalby*, 19 Ill. 353. pp. 338, 341, 376, 545. c 7 Phila. 13; 44 Iowa, 318; 48 Ill. 254; 15 Minn. 56; 46 N. H. 219; 37 Ill. 508.
- St. Louis etc. R. Co. v. Myrtle*, 51 Ind. 566. p. 343. c 57 Ind. 597; 55 Ind. 372.
- St. Louis etc. R. Co. v. South*, 43 Ill. 176. pp. 341, 342, 376.
- Stockton v. Frey*, 4 Gill, 406. pp. 199, 211, 545, 571. c 21 Md. 283, 284, 288, 300; 39 Md. 353; 2 Mont. 525, 526; 11 Gratt. 712, 715; 6 Nev. 236; 30 Md. 229.
- Stockwell v. United States*, 13 Wall. 542. p. 482.
- Stoddard v. Long Island R. Co.*, 5 Sandf. S. C. 180. p. 383.
- Stoddard v. St. Louis R. Co.*, 65 Mo. 514. p. 563.
- Stokes v. Eastern Counties R. Co.*, 2 Fost. & Fin. 691. pp. 131, 139, 213. c L. R. 4 Q. B. 390; 8 Best & S. 380, 392; L. R. 2 Q. B. 419, 429; 36 L. J. (Q. B.) 185, 190; 97 Mass. 368.
- Stokes v. Saltonstall*, 13 Pet. 181. pp. 28, 114, 122, 156, 191, 192, 196, 211, 213, 236, 237, 238, 255, 261, 266, 357, 410, 558. (In full, p. 183.) c 1 Abb. Adm. 359; 23 Pa. St. 150; 21 Md. 283, 290, 298; 1 McLean, 545; 2 McLean, 160; 2 Duv. 558; 2 Col. 458; 15 Mich. 140; 34 Barb. 268; 3 Cliff. 421; 38 Miss. 275; 11 Heisk. 403, 404; 22 Wall. 350; 2 Mont. 523, 526; 24 Ga. 365; 44 Ind. 201, 204; 48 N. H. 314; 39 Md. 353; 4 Iowa, 548, 549; 26 Ill. 387; 21 Conn. 254; 32 Barb. 659; 18 N. Y. 538, 539, 544; 13 Vt. 327; 4 Gill, 423; 24 N. Y. 193; 5 Duer, 197; 49 Me. 281; 13 Cal. 603; 11 Gratt. 710; 17 Ill. 410; 5 Ind. 341; 13 Conn. 327; 16 Barb. 116; 37 Mo. 546; 9 Metc. 13; 15 Ill. 469. d 11 Allen, 317.
- Stone v. Chicago etc. R. Co.*, 47 Iowa, 82; s. c. 10 Ch. Leg. N. 78. pp. 70, 71, 340, 377, 563.
- Stoneman v. Erie R. Co.*, 52 N. Y. 429. pp. 522, 523, 538. c 67 N. Y. 212; 6 Hun, 547.
- Stonesifer v. Sheble*, 31 Mo. 243. p. 568. c 59 Ind. 320.
- Storer v. Gowen*, 18 Me. 177. p. 177.
- Stuart v. Machias Port*, 48 Me. 477. p. 271.
- Sullivan v. Philadelphia etc. R. Co.*, 30 Pa. St. 234; s. c. 6 Am. L. Reg. (N. s.) 342. pp. 199, 208, 211, 212, 317, 562, 563. c 36 Wis. 464; 33 Pa. St. 326; 56 Pa. St. 296; 59 Pa. St. 250; 12 Wall. 376; 34 N. Y. 412; 11 Allen, 505.
- Sunday v. Gordon, Blatchf. & H. Adm.* 569. pp. 66, 466, 467.
- Sutton v. Delaware etc. R. Co.*, 66 N. Y. 243; s. c. 4 Hun, 760. pp. 225, 233.
- Sutton v. Temple*, 12 Mee. & W. 64. p. 137.
- Suydam v. Grand Street etc. R. Co.*, 40 Barb. 375. p. 553. c 36 Mo. 32; 25 Ind. 197.
- Swarthout v. New Jersey Steamboat Co.*, 48 N. Y. 209; s. c. 46 Barb. 222. p. 475.
- Swindler v. Hilliard*, 2 Rich. L. 286. pp. 389, 393.
- Sylph (The)*, 4 Blatchf. 24; s. c. 37 L. J. (Adm.) 14; L. R. 2 Adm. 24; 17 L. T. (N. s.) 519. p. 481. c L. R. 2 P. C. 449; 38 L. J. (Adm.) 14; L. R. 2 Adm. 328, 329.

T.

- Taber v. Delaware etc. R. Co.*, 71 N. Y. 489. pp. 231, 268.
- Talley v. Great Western R. Co.*, 6 C. P. 44; s. c. 40 L. J. (C. P.) 9. p. 516. c 18 Alb. L. J. 33; 1 Exch. Div. 22; 16 Abb. Pr. (N. s.) 355; 32 Wis. 92, 96. d L. R. 6 Q. B. 618; 40 L. J. (Q. B.) 302; 24 Upper Canada C. P. 212.
- Tarbell v. Central Pacific R. Co.*, 34 Cal. 616. pp. 28, 29, 30, 376.
- Taylor v. Ashton*, 11 Mee. & W. 401. p. 56.
- Taylor v. Day*, 16 Vt. 566. p. 548.
- Taylor v. Grand Trunk R. Co.*, 48 N.

- H. 304; s. c. 8 Am. L. Reg. (N. s.) 575. pp. 201, 202, 215, 574.
- Tebbutt v. Bristol etc. R. Co., 40 L. J. (Q. B.) 78; s. c. 23 L. T. (N. s.) 772; L. R. 6 Q. B. 73; 19 Week. Rep. 383. p. 106.
- Terre Haute etc. R. Co. v. Fitzgerald, 47 Ind. 79. pp. 69, 71, 376, 549.
- Terre Haute etc. R. Co. v. Graham, 46 Ind. 239. p. 549.
- Terre Haute etc. R. Co. v. Vanatta, 21 Ill. 188. pp. 376, 377, 572, 577, 579.
 c 40 Ill. 504; 43 Ill. 368; 48 Ill. 257; 63 Ill. 307; 46 N. H. 219. d 79 Ill. 590, 592.
- Terry v. Flushing etc. R. Co., 13 Hun, 359; s. c. 4 Abb. N. C. 523. p. 70.
- Terry v. Jewett, 20 Alb. L. J. 393. p. 233.
- Thatcher v. Great Western R. Co., 4 Upper Canada C. P. 543. p. 562.
- Thayer v. St. Louis etc. R. Co., 22 Ind. 26.
 c 44 Iowa, 201; 20 Mich. 127; 50 Mo. 305; 18 Iowa, 284; 14 Minn. 363; 50 Ind. 84; 23 Ind. 83; 34 Ind. 299; 8 Cent. L. J. 14; 58 Ind. 28; 40 N. Y. 449. o 47 Ind. 482.
- Theobald v. Railway Passengers' Assur. Co., 26 Eng. Law & Eq. 432. pp. 51, 571.
- Thomas v. Great Western R. Co., 14 Upper Canada Q. B. 389. p. 512.
- Thomas v. Hook, 4 Phila. 119. p. 220.
- Thomas v. Rhymney R. Co., L. R. 5 Q. B. 266; s. c. (affirmed in Exchequer Chamber), L. R. 6 Q. B. 226; 40 L. J. (Q. B.) 89; 19 Week. Rep. 477; 24 L. T. (N. s.) 145. pp. 412, 414, 415, 416, 417.
 c 35 Upper Canada Q. B. 560; 42 L. J. (Exch.) 91, 94, 96.
- Thompson v. Belfast etc. R. Co., Irish Rep. 5 C. L. 517. pp. 229, 232, 233, 268.
- Thompson v. New Orleans etc. R. Co., 50 Miss. 315. pp. 66, 568, 575.
- Thompson v. North Missouri R. Co., 51 Mo. 190. p. 552.
- Thorogood v. Bryan, 8 C. B. 115; s. c. 18 L. J. (C. P.) 336. pp. 282, 283, 284, 285, 286, 287, 288, 289, 294. (In full, p. 273.)
 c 6 Gray, 72; L. R. 10 Exch. 51, 52; 4 Am. L. Reg. (N. s.) 17; 29 Vt. 428; 11 C. B. 147; 6 Duer, 408; 38 N. Y. 262; 105 Mass. 79; 31 Barb. 388; 17 Barb. 97; L. R. 9 Exch. 182; 43 L. J. (Exch.) 103, 104; 5 Exch. 346; 19 L. J. (Exch.) 298; 24 Md. 104; 44 L. J. (Exch.) 92, 93; 15 Irish Rep. C. L. (N. s.) 343; 46 Pa. St. 159, 160, 161; 38 N. Y. 262. ? 2 C. B. (N. s.) 750; El. Bl. & El. 728; 43 Wis. 526; 6 Cent. L. J. 430; 19 N. Y. 343; 36 N. J. L. 226, 228.
- Thorp v. Brookfield, 36 Conn. 321. p. 271.
- Thorp v. Hammond, 12 Wall. 409. p. 487.
- Thorpe v. New York etc. R. Co., 19 Alb. L. J. 471; s. c. 13 Hun, 70; 4 Abb. N. C. 523. pp. 224, 346, 369, 520.
- Thrings v. Central Park R. Co., 7 Robt. 616. p. 562.
- Thurston v. Union Pacific R. Co., 4 Dill. 321; s. c. 8 Ch. Leg. N. 323. pp. 29, 302, 375. (In full, p. 10.)
- Titcomb v. Fitchburg R. Co., 12 Allen, 254. p. 220.
- Tobin v. Portland etc. R. Co., 59 Me. 183. pp. 106, 226.
 c 62 Me. 562.
- Todd v. Old Colony R. Co., 3 Allen, 18; s. c. 7 Allen, 207. pp. 44, 252, 257.
 c 56 Pa. St. 293; 121 Mass. 428; 16 Am. L. Reg. 666; 5 Bush, 7; 8 Allen, 230, 235; 6 Cent. L. J. 47; 39 Md. 346; 14 Allen, 432; 20 Minn. 128; 29 Iowa, 87; 37 Mich. 114; 95 U. S. 443. d 104 Mass. 141. ? 17 Wis. 495.
- Toledo etc. R. Co. v. Baddeley, 54 Ill. 19. pp. 227, 271.
- Toledo etc. R. Co. v. Beggs, 85 Ill. 80. pp. 44, 211, 212, 222, 402, 555, 556.
- Toledo etc. R. Co. v. Bevin, 26 Ind. 443. p. 552.
- Toledo etc. R. Co. v. Brooks, 81 Ill. 245. p. 44.
- Toledo etc. R. Co. v. Daniels, 21 Ind. 256. p. 547.
- Toledo etc. R. Co. v. Hammond, 33 Ind. 379. pp. 510, 513, 532, 533.
- Toledo etc. R. Co. v. McDonough, 53 Ind. 289. pp. 338, 339, 578.
- Toledo etc. R. Co. v. Patterson, 63 Ill. 304. pp. 343, 575.
 c 1 Bradw. 477, 478. d 79 Ill. 540.

Toledo etc. R. Co. v. Riley, 47 Ill. 514. p. 271.

Toledo etc. R. Co. v. Rumbold, 40 Ill. 143. p. 415.

Tomlinson v. Collett, 3 Blackf. 436. p. 558.

Toomey v. London etc. R. Co., 3 C. B. (N. s.) 146; s. c. 27 L. J. (C. P.) 39. pp. 79, 80, 83, 84, 90, 105. (In full, p. 72.)

c 28 Mich. 453; 34 N. Y. 14; 4 Hurl. & N. 784, 786; L. R. 8 Q. B. 177; 42 L. J. (Q. B.) 109; 29 L. J. (C. P.) 97, 335; 29 L. J. (Exch.) 97; 8 C. B. (N. s.) 572; 7 Jur. (N. s.) 169; 35 N. J. L. 33; L. R. 1 C. P. 282; 35 L. J. (C. P.) 187; 73 Pa. St. 125; 36 L. J. (C. P.) 23; L. R. 2 C. P. 10; 9 Jones & Sp. 23; 59 N. Y. 366; 10 Allen, 192; 3 App. Cas. 1171.

Torpey v. Grand Trunk R. Co., 20 Upper Canada C. P. 446. p. 49.

c 34 Upper Canada Q. B. 457, 462. d 23 Upper Canada C. P. 548, 549.

Torpey v. Williams, 3 Daly, 162. pp. 511, 512, 520.

c 3 Daly, 393; 32 Wis. 100.

Tower v. Utica etc. R. Co., 7 Hill, 47. p. 518.

c 1 Daly, 153, 154, 205, 495; 3 Daly, 396; 15 Mich. 141; 3 Barb. 389; 2 Ch. Leg. N. 397; 73 Ill. 365; 118 Mass. 277; 16 Abb. Pr. (N. s.) 354; 2 Abb. Pr. (N. s.) 51; 32 Wis. 96; 2 Daly, 255; 4 Cent. L. J. 37; 93 U. S. 184; 15 Alb. L. J. 191; 21 Ind. 57. d 15 Mich. 135; 17 Am. L. Reg. (N. s.) 515. N. Y. 62.

Townsend v. New York etc. R. Co., 6 Thomp. & C. 495; s. c. 4 Hun, 217. pp. 338, 339, 376.

c 29 Ohio St. 219; 37 Mich. 346; 66 N. Y. 458; 48 Vt. 235.

Tracy v. Wood, 3 Mason, 132. p. 178.

Travers v. Kansas etc. R. Co., 63 Mo. 421. pp. 369, 549.

Truex v. Erie R. Co., 4 Lans. 198. p. 261.

Tucker v. Henniker, 41 N. H. 317. p. 220.

Tuff v. Warman, 2 C. B. (N. s.) 750; s. c. 5 C. B. (N. s.) 573. pp. 251, 283, 285.

c 20 N. Y. 75; 5 Hun, 480; 4 Robt. 213; 38 Md. 599; 101 Mass. 463, 464, 465, 466; 29 Md. 436; 95 U. S. 442; 52 N. H. 554; 12 C. B. (N. s.) 78; 24 Upper Canada Q. B. 105; 6 Cent. L. J. 46; 36 N. J. L. 228.

Tuller v. Talbot, 23 Ill. 357. pp. 203, 206, 239.

c 15 Alb. L. J. 62; 56 Ill. 142; 5 Ch. Leg. N. 10; 48 N. H. 316; 4 Col. 9.

Tunney v. Midland R. Co., L. R. 1 C. P. 291; s. c. 12 Jur. (N. s.) 691. pp. 48, 147.

c 53 Ill. 340; 49 Barb. 326; 62 Me. 465; 1 C. P. Div. 167; 59 Pa. St. 246, 252; 45 L. J. 339.

Turner v. North Beach etc. R. Co., 34 Cal. 594. pp. 374, 575, 580.

c 57 Me. 250; 34 Cal. 590; 44 Iowa, 313; 3 So. Car. 598.

Turner v. North Carolina R. Co., 63 N. C. 522. p. 28.

Turner v. Richmond etc. R. Co., 70 N. C. 1. p. 376.

Tyly v. Morrice, Carth. 486. p. 497.

U.

Union Ins. Co. v. Shaw, 2 Dill. 14. p. 482.

Union Pacific R. Co. v. Hand, 7 Kan. 380. pp. 201, 555, 577, 583.

Union Pacific R. Co. v. Nichols, 8 Kan. 505; s. c. 4 Ch. Leg. N. 82. p. 46.

c 64 Mo. 474.

United States v. The Anna, 2 Am. L. Reg. 421. p. 480.

United States v. The Bright Star, 7 Int. Rev. Rec. 179. p. 481.

United States v. The Candace, 9 Int. Rev. Rec. 177. p. 482.

United States v. Coombs, 12 Pet. 72. p. 486.

United States v. The C. B. Church, 1 Woods, 275. p. 482.

United States v. Cruikshank, 92 U. S. 542. p. 347.

United States v. The Echo, 4 Blatchf. 446. p. 481.

United States v. Freeman, 3 How. 556. p. 486.

United States v. The James Morrison, Newb. Adm. 241. p. 481.

United States v. The Louisa Barbara, Gilp. 332. p. 479.

United States v. The Newrea, 19 How. 94. p. 479.

United States v. Norton, 1 Low. 179. p. 480.

United States *v.* The Ottawa, Newb. Adm. 536. pp. 475, 481.
 United States *v.* Reese, 92 U. S. 214. p. 347.
 United States *v.* The Seneca, 1 Am. L. Reg. (N. S.) 281. p. 481.
 United States *v.* Simms, 1 Cranch, 252. p. 482.
 United States *v.* The Sun, 1 Am. L. Reg. (N. S.) 277; s. c. 4 West. L. J. 75. p. 481.
 United States *v.* The Thomas Swan, 9 Law Rep. (N. S.) 201. p. 481.
 United States *v.* The William Pope, Newb. Adm. 256. p. 481.
 Upshare *v.* Aidee, 1 Comyns, 25. p. 521.

V.

Van Buskirk *v.* Roberts, 31 N. Y. 661. pp. 65, 66, 432.
 c 52 N. H. 604; 54 N. Y. 515.
 Van Den Eynde *v.* Ulster R. Co., Irish Rep. 5 C. L. 328. p. 372.
 Vanderplank *v.* Miller, Moo. & M. 169. p. 284.
 Van Horn *v.* Kermit, 4 E. D. Smith, 453. pp. 513, 524, 534, 535, 539.
 c 15 Mich. 134; 1 Daly, 154; 30 N. Y. 617.
 Vankirk *v.* Pennsylvania R. Co., 76 Pa. St. 66. p. 70.
 Van Lien *v.* Scoville Man. Co., 14 Abb. Pr. (N. S.) 74; s. c. 4 Daly, 554. pp. 221, 562.
 c 6 Cent. L. J. 46; 10 Ch. Leg. N. 121; 95 U. S. 442.
 Van Santvoord *v.* St. John, 6 Hill, 157. p. 429.
 Van Toll *v.* South-Eastern R. Co., 12 C. B. (N. S.) 75; s. c. 31 L. J. (C. P.) 241; 8 Jur. (N. S.) 1213; 10 Week. Rep. 578; 6 L. T. (N. S.) 244. p. 519.
 c 2 Q. B. Div. 428, 429. d 10 Jones & Sp. 363; 1 C. P. Div. 626, 631, 632.
 Vedder *v.* Fellows, 20 N. Y. 126. pp. 335, 336, 375.
 c 4 Hun, 219; 9 Thomp. & C. 497; 3 Wis. 570; 42 Ill. 424; 46 N. H. 220, 221.
 Vicksburg *v.* Hennessy, 54 Miss. 391. p. 552.

Vicksburg etc. R. Co. *v.* Howe, 52 Miss. 202. p. 108.
 Vinton *v.* Middlesex R. Co., 11 Allen, 304. pp. 20, 29, 301, 302, 303, 317, 375, 443, 465. (In full, p. 6.)
 c 36 Wis. 463; 53 Miss. 223; 95 U. S. 503.
 Vinton *v.* Schwab, 32 Vt. 612. p. 563.
 Virginia etc. R. Co. *v.* Sanger, 15 Gratt. 230. pp. 201, 222.
 Vose *v.* Lancashire etc. R. Co., 4 Hurl. & N. 728; s. c. 4 Jur. (N. S.) 364; 27 L. J. (Exch.) 249. p. 224.
 c 3 Hurl & N. 656; 27 L. J. (Exch.) 406; 32 Iowa, 364; 3 Robt. 82; 28 How. Pr. 473; 3 Exch. Div. 344; 49 N. Y. 426; 48 Me. 118.
 Vrede (The), Lush. 322; s. c. 30 L. J. (Adm.) 209. p. 471.

W.

Wabash etc. Canal *v.* Mayer, 10 Ind. 400. p. 552.
 c 42 Ind. 342; 12 Ind. 523.
 Wade *v.* Kalbfleisch, 58 N. Y. 282. p. 546.
 Wade *v.* Leroy, 20 How. 34. p. 551.
 c 63 Barb. 266.
 Waite *v.* North-Eastern R. Co., 5 Jur. (N. S.) 936; 28 L. J. (Q. B.) 258; El. Bl. & El. 728. pp. 283, 284, 285, 292, 294.
 c 36 N. J. L. 228; L. R. 10 Exch. 53; 8 Best & S. 334. ? 30 Ohio St. 470.
 Wakefield *v.* South Boston R. Co., 117 Mass. 544. pp. 71, 376.
 c 67 Me. 166; 17 Alb. L. J. 367; 6 Cent. L. J. 382.
 Waland *v.* Elkins, 1 Stark. 272. pp. 410, 411, 436, 555.
 Walker *v.* Erie R. Co., 63 Barb. 260. p. 212, 560, 569, 570, 583.
 Walker *v.* Herron, 22 Texas, 55. p. 553.
 Walker *v.* South-Eastern R. Co., L. R. 5 C. P. 640. p. 373.
 Walker *v.* Transportation Co., 3 Wall. 150. pp. 391, 484.
 Walker *v.* Westfield, 39 Vt. 246. p. 553.
 Waller *v.* Harris, 20 Wend. 555. p. 486.
 Walsh *v.* Chicago etc. R. Co., 42 Wis.

- 23; s. c. 9 Ch. Leg. N. 315. pp. 29, 68, 546.
- Walsh v. Str. H. M. Wright, Newb. Adm. 494. pp. 305, 311, 512, 518.
- Walters v. Chicago etc. R. Co., 41 Iowa, 71. p. 293.
- Walton v. Waterhouse, 2 Saund. 421 a, note 2. p. 56.
- Ward v. Central Park etc. R. Co., 42 How. Pr. 289. pp. 261, 445.
c 8 Hun, 498; 67 N. Y. 597.
- Ward v. General Omnibus Co., 42 L. J. (C. P.) 265; s. c. 28 L. T. (N. s.) 850 (affirming 21 Week. Rep. 358; 27 L. T. (N. s.) 761). p. 370.
- Ward v. North Haven, 43 Conn. 148. p. 220.
- Ward v. Railroad Co., 2 Abb. Pr. (N. s.) 411. p. 252.
- Ward v. Rich, 1 Vent. 103. p. 564.
- Ward v. Smith, 11 Price, 19. p. 550.
- Ward v. Vanderbilt, 4 Abb. App. Dec. 521. pp. 66, 432, 466, 567, 570.
- Wardrobe v. California Stage Co., 7 Cal. 118. p. 575.
c 57 Me. 256.
- Ware v. Gay, 11 Pick. 106. pp. 114, 191, 211, 213, 548, 554.
c 47 Ind. 481; 8 Pa. St. 484; 38 Miss. 275; 4 Iowa, 55; 2 Mont. 526; 18 N. Y. 538; 4 Col. 10.
d 11 Allen, 217.
- Waring v. Clark, 5 How. 441. p. 481.
c McAll. 108; 1 Cin. Superior Ct. 55; 41 Ala. 63.
- Warner v. Burlington etc. R. Co., 22 Iowa, 166. p. 522.
- Warner v. New York etc. R. Co., 44 N. Y. 465; s. c. 45 Barb. 299. p. 553.
c 44 Ind. 80; 25 Mich. 282; 7 Jones & Sp. 350, 352; 11 Hun, 219; 4 Jones & Sp. 448; 65 Barb. 102; 50 How. Pr. 108; 38 Iowa, 517; 1 Bradw. 422; 8 Jones & Sp. 183. ? 65 Barb. 149.
- Warren v. Fitchburg R. Co., 8 Allen, 227. p. 269.
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- Washburn v. Nashville etc. R. Co. 3 Head, 638. pp. 44, 345.
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- Watson v. Duykinck, 3 Johns. 335. pp. 467, 468.
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- Way v. Illinois etc. R. Co., 40 Iowa, 341. p. 552.
c 38 Iowa, 102.
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c 17 Ind. 105; 42 Ind. 342; 26 Ind. 23.
- Weaver v. Rome etc. R. Co., 3 N. Y. S. C. (T. & C.) 270. pp. 338, 339, 376.
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- Weed v. Panama R. Co., 5 Duer, 193; s. c. 17 N. Y. 362. pp. 68, 361, 364, 367.
c 3 Cliff. 427; 7 Bosw. 135; 11 Nev. 364; 36 Wis. 670, 671, 675; 3 Jones & Sp. 128; 20 N. Y. 50; 52 N. H. 604; 57 Me. 216, 235, 237; 5 Bosw. 703.
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c 36 Barb. 425; 30 N. Y. 611, 617, 621; 15 Mich. 127; 20 Pa. St. 503; 29 Barb. 56; 9 Lower Canada, 178; 1 Newb. Adm. 496; 27 Vt. 111; 24 N. Y. 278; 23 Vt. 210; 19 N. H. 339; 23 N. H. 284; 6 La. An. 545; 13 Ill. 750, 751; 31 Cal. 53; 6 Cush. 73; 1 E. D. Smith, 97, 99; 1 Hilt. 233.
? 25 Md. 90.
- Weeks v. New York etc. R. Co., 72 N. Y. 56; s. c. 6 Reporter, 54; 17 Am. L. Reg. (N. s.) 506; 6 Cent. L. J. 201. pp. 303, 305, 518.
- Weiss v. Pennsylvania R. Co., 79 Pa. St. 387.
- Welch v. Pullman etc. Co., 16 Abb. Pr. (N. s.) 352; s. c. 1 Buff. Superior Ct. N. Y. 457; 4 Abb. N. C. 523. pp. 518, 531, 532.
- Welfare v. London etc. R. Co., L. R. 4

- Q. B. 693; s. c. 38 L. J. (Q. B.) 241; 17 Week. Rep. 1065; 20 L. T. (N. S.) 743. pp. 104, 105.
- Weller v. London etc. R. Co., L. R. 9 C. P. 126; s. c. 43 L. J. (C. P.) 137; 22 Week. Rep. 302; 29 L. T. (N. S.) 888. pp. 229, 231, 233, 268.
- c 44 L. J. (Q. B.) 113; L. R. 10 Q. B. 273; 71 N. Y. 493.
- Welles v. New York etc. R. Co., 26 Barb. 641; s. c. 24 N. Y. 181; 25 N. Y. 442; 6 Am. L. Reg. 713. pp. 383, 385, 400, 402.
- c 32 N. J. L. 413; 34 N. J. L. 516; 25 N. Y. 444, 446, 453; 29 Barb. 610; 51 Pa. St. 326; 17 How. 364; 21 Ind. 51, 52; 28 N. J. L. 190; 39 Iowa, 254; 2 Cent. L. J. 367; 5 Bosw. 703. d 29 Barb. 610, 611, 615. ? 37 Ill. 505, 507; 41 Ala. 502; 51 Pa. St. 328; 47 Ind. 485; 20 Minn. 129.
- Welsh v. Pittsburgh etc. R. Co., 10 Ohio St. 75. p. 387.
- Wentz v. Erie R. Co., 5 Thomp. & C. 556; 3 Hun, 241. pp. 71, 376.
- West v. Str. Uncle Sam, McAll. 510. pp. 66, 466.
- West Chester etc. R. Co. v. McElwee, 67 Pa. St. 311. p. 562.
- West Chester etc. R. Co. v. Miles, 55 Pa. St. 209. pp. 28, 346, 377.
- c 55 Ill. 189; 95 U. S. 503.
- Weston v. New York etc. R. Co., 10 Jones & Sp. 156; s. c. 3 Abb. N. C. 572. p. 110.
- c 18 Alb. L. J. 70.
- Western Union Tel. Co. v. Eyser, 91 U. S. 495, note. p. 575.
- Weyland v. Elkins, Holt, 227; s. c. sub nom. Waland v. Elkins, 1 Stark. 272. pp. 236, 237.
- Whalen v. St. Louis etc. R. Co., 60 Mo. 323. pp. 234, 271, 571, 584.
- Wheaton v. North Beach etc. R. Co., 36 Cal. 590.
- c 2 Mont. 523.
- Wheeler v. San Francisco etc. R. Co., 31 Cal. 46. pp. 28, 432.
- Wheelock v. Boston etc. R. Co., 105 Mass. 203. p. 270.
- Whitaker v. Eighth Avenue R. Co., 51 N. Y. 295. p. 371.
- Whitaker v. Manchester etc. R. Co., L. R. 5 C. P. 464, note. pp. 231, 268.
- Whitall v. The William Henry, 4 La. 223. p. 357.
- White v. Boulton, 1 Peake, 113. pp. 117, 199, 238, 481.
- c 21 Md. 296, 301. d 9 Metc. 7.
- White v. McDonough, 3 Sawyer, 311. p. 463.
- Whitesell v. Crane, 8 Watts & S. 369. pp. 526, 538.
- Whitesides v. Thurlkill, 12 Smed. & M. 599. p. 389.
- Whitmore v. Steamboat Caroline, 20 Mo. 513. p. 511.
- c 1 Mo. 60.
- Whitney v. Clarendon, 18 Vt. 252. p. 564.
- Whitton v. Chicago etc. R. Co., 25 Wis. 424. p. 544.
- Wilcox v. The Philadelphia, 9 La. 84. p. 519.
- c 13 La. An. 455.
- Wilcox v. Rome etc. R. Co., 39 N. Y. 358. p. 233.
- Wilkie v. Bolster, 3 E. D. Smith, 327. pp. 208, 211, 212.
- c 2 Mont. 525; 4 Col. 10.
- Wilkinson v. Fairrie, 1 Hurl. & Colt. 633; s. c. 9 Jur. (N. S.) 280; 32 L. J. (Exch.) 73; 7 L. T. (N. S.) 599. p. 87.
- c 9 Am. L. Reg. (N. S.) 108; 35 L. J. (C. P.) 190; L. R. 1 C. P. 288; 12 Jur. (N. S.) 434; 39 Iowa, 620; 55 How. Pr. 173.
- Willetts v. Buffalo etc. R. Co., 14 Barb. 585. pp. 271, 293, 339, 376.
- c 37 Mo. 548; 31 N. J. L. 393; 24 Md. 125; 10 Bosw. 33; 16 Abb. Pr. 349; 39 How. Pr. 416; 1 Keyes, 573; 33 How. Pr. 200; 2 Abb. App. Dec. 382; 46 Barb. 270, 271; 22 Barb. 586; 66 Barb. 51; 60 N. Y. 333.
- Williams v. Carwardine, 4 Barn & Adol. 621. p. 55.
- Williams v. Great Western R. Co., 10 Exch. 15. p. 529.
- Williams v. Keokuk etc. Packet Co., 3 Cent. L. J. 400. pp. 518, 529.
- Williams v. Vanderbilt, 28 N. Y. 217; s. c. 29 Barb. 491. pp. 66, 432, 466, 567.
- c 4 Abb. App. Dec. 523; 77 N. C. 352.

- Williamson v. Grand Trunk R. Co., 17 Upper Canada C. P. 615. pp. 374, 570.
- Willis v. Long Island R. Co., 32 Barb. 398; s. c. 34 N. Y. 670. pp. 67, 224, 259, 266.
 e 36 N. Y. 43; 8 Hun, 498; 67 N. Y. 597; 34 N. Y. 675; 100 Mass. 215; 19 Alb. L. J. 472. d 51 Ill. 498, 499.
- Wilson v. Brett, 11 Mee. & W. 113. pp. 41, 178, 398, 574.
- Wilson v. Chesapeake etc. R. Co., 21 Gratt. 654. pp. 432, 433, 436, 521, 527.
- Wilson v. Grand Trunk R. Co., 56 Me. 60; s. c. 8 Am. L. Reg. (N. S.) 398. pp. 510, 521, 522.
- Wilson v. Hamilton, 4 Ohio St. 722. p. 387.
- Wilson v. Newport Dock Co., 4 Hurl. & Colt. 232; s. c. L. R. 1 Exch. 177; 12 Jur. (N. S.) 233. p. 565.
- Wilson v. Northern Pacific R. Co. (Sup. Ct. Minn. 1879), 10 Cent. L. J. 56. p. 267.
- Wilson v. Susquehanna Turnpike Co., 21 Barb. 68. p. 220.
- Wilt v. Welsh, 6 Watts, 9. p. 542.
- Wilton v. Atlantic etc. Nav. Co., 10 C. B. (N. S.) 452; s. c. 8 Jur. (N. S.) 232; 30 L. J. (C. P.) 369; 9 Week. Rep. 748; 4 L. T. (N. S.) 706. pp. 471, 525.
- Wilton v. Middlesex R. Co., 107 Mass. 108. pp. 44, 293, 345, 439, 440, 455. (In full, p. 438.)
 e 60 Mo. 416; 28 Ohio St. 31.
- Winship v. Enfield, 42 N. H. 197. pp. 204, 220.
- Winterbottom v. Wright, 10 Mee. & W. 109. p. 41.
 e 11 Allen, 520; 8 El. & Bl. 1049, 1052; 17 Gratt. 239; 4 Gray, 102; 11 Hun, 357; 7 La. An. 324; L. R. 3 C. P. 496, 497; 37 L. J. (C. P.) 234; 56 N. Y. 127; 1 N. Y. S. C. (T. & C.) 454; 38 Pa. St. 110; 55 N. Y. 612; 29 N. H. 35; 27 Vt. 377; 1 Phila. 157; 6 N. Y. 408; 42 Iowa, 250; 1 Hilt. 438, 443; 19 C. B. (N. S.) 238, 243; 11 Jur. (N. S.) 675; 34 L. J. (C. P.) 297, 298; 15 N. Y. 450.
- Winters v. Hannibal etc. R. Co., 39 Mo. 468. pp. 259, 560, 571.
- Winch v. Birkenhead etc. R. Co., 5 De G. & Sm. 562; s. c. 6 Jur. 1035; 13 Eng. Law & Eq. 506. p. 418.
- Withers v. North Kent R. Co., 27 L. J. Exch. 417; s. c. at nisi prius, sub nom. Withers v. Great Northern R. Co., 1 Fost. & Fin. 165; 3 Hurl. & N. 969. pp. 206, 207, 211, 219.
 e 9 Jur. (N. S.) 341.
- Witte v. Hague, 2 Dow. & Ry. 83. p. 222.
- Wolf v. Summers, 2 Camp. 631. pp. 471, 524.
 e 1 Gilp. 190; 1 Hilt. 502; Abb. Adm. 51.
- Woodard v. Eastern Counties R. Co., 7 Jur. (N. S.) 331; s. c. 30 L. J. (M. C.) 126; 9 Week. Rep. 660; 4 L. T. (N. S.) 336. pp. 69, 336.
- Woods v. Devin, 13 Ill. 746. pp. 513, 520, 521.
 e 22 Ill. 214, 281; 56 Ill. 217; 10 How. Pr. 333.
- Woodward v. Aborn, 35 Me. 271. p. 220.
- Woodward v. Booth, 7 Barn. & Cress. 301. p. 555.
- Woodward v. Chicago etc. R. Co., 23 Wis. 400. p. 549.
 e 29 Gratt. 439.
- Woodward v. Washburn, 3 Denio, 369. p. 547.
- Wordsworth v. Willan, 5 Esp. 273. p. 237.
- Wright v. Caldwell, 3 Mich. 51. p. 471.
- Wright v. Indianapolis etc. R. Co., 18 Ind. 168. p. 547.
- Wright v. London etc. R. Co., L. R. 10 Q. B. 298; s. c. 1 Q. B. Div. 252. p. 106.
- Wright v. Midland R. Co., 42 L. J. (Exch.) 89; s. c. L. R. 8 Exch. 137; 21 Week. Rep. 460; 29 L. T. (N. S.) 436. pp. 416, 417.
 e 44 L. J. (Exch.) 137; 35 Upper Canada Q. B. 561.
- Wright v. Pindar, Style, 34. p. 564.
- Wright v. Wilcox, 19 Wend. 343. p. 358.
- Wyatt v. Citizens' R. Co., 55 Mo. 485. pp. 228, 268, 563.
 e 2 Cent. L. J. 541; 59 Mo. 37.

Wyborn v. Great Northern R. Co., 1
Fost. & Fin. 162. p. 206.

c 27 L. J. (Exch.) 419; 3 Hurl. & N. 972.

Wyld v. Pickford, 8 Mee. & W. 443
pp. 178, 389, 398.

Wylde v. Northern R. Co., 53 N. Y.
156. p. 437.

Wynn v. Allard, 5 Watts & S. 524. p.
271.

Wyman v. Penobscot etc. R. Co., 46
Me. 162. p. 418.

Y.

Yates v. Duff, 5 Car. & P. 369. p. 467.

Yeomans v. Contra Costa Steam Nav.
Co., 44 Cal. 71. pp. 45, 46, 463, 556.

c 2 Mont. 525; 49 Cal. 130; 46 Tex. 538.

York Co. v. Central R. Co., 3 Wall. 113.
p. 391.

Yonge v. Kinney, 28 Ga. 111. pp. 211,
560.

c 4 Col. 10.

Yonge v. Pacific Mail Steamship Co.,
1 Cal. 353. pp. 568, 569.

Young v. Black, 7 Cranch, 568. p. 564.

Young v. Fewson, 8 Car. & P. 55. pp.
469, 555.

Yznaza Del Valle v. The Richmond, 27
La. An. 90.

Z.

Zell v. Arnold, 2 Pa. St. 295. pp. 542,
543.

Zemp v. Wilmington etc. R. Co., 9
Rich. L. 84. pp. 212, 260, 330, 557,
562, 563.

Zenobia (The), Abb. Adm. 48. pp.
467, 570.

c 1 Woods, 412.

Zunz v. South-Eastern R. Co., 10 Best
& S. 594; s.c. L. R. 4 Q. B. 539. p. 525.

c 35 Upper Canada Q. B. 560; Irish Rep.

10 O. L. 65.

CASES

ON THE LAW OF

CARRIERS OF PASSENGERS.

CHAPTER I.

OF THE OBLIGATION TO RECEIVE AND CARRY.

- LEADING CASES:**
1. *Bennett v. Dutton*. — General obligation to receive and carry.
 2. *Vinton v. Middlesex Railroad Company*. — Not bound to carry drunken persons.
 3. *Thurston v. Union Pacific Railroad Company*. — Not bound to carry gamblers who seek to come on board to ply their vocation.
 4. *Jencks v. Coleman*. — Not bound to carry a drummer for a rival line.
 5. *Pearson v. Duane*. — Expulsion of a passenger exiled by a vigilance committee.
 6. *O'Brien v. Boston and Worcester Railroad Company*. — Not bound to carry a person who has just been expelled for good cause.

- NOTES:**
- § 1. Who is a common carrier of passengers.
 2. Duty of common carrier to receive and carry passengers.
 3. What will excuse carrier from receiving and carrying passenger.
 4. Want of room will usually excuse.
 5. Payment of fare.
 6. Ejecting passengers who have been received.

Bennett v. Dutton.

1. GENERAL OBLIGATION TO RECEIVE AND CARRY.

BENNETT v. DUTTON.*

*Superior Court of Judicature of New Hampshire, 1839.*HON. JOEL PARKER, *Chief Justice.*

" SAMUEL GREEN,	} <i>Justices.</i>
" NATHAN G. UPHAM,	
" LEONARD WILCOX,	

1. **Obligation of Common Carrier of Passengers to receive and carry.**—The proprietors of a stage-coach who hold themselves out as common carriers of passengers are bound to receive all who require a passage, so long as they have room and there is no legal excuse for a refusal. It is not a lawful excuse that they run their coach in connection with another coach, which extends the line to a certain place, and have agreed with the proprietor of such other coach not to receive passengers who come from that place, on certain days, unless they come in his coach.
2. **Refusal to carry Passenger who proposes to take Passage with a Rival Connecting Line.**—The defendant was one of the proprietors and the driver of a stage-coach running daily between Amherst and Nashua which connected at the latter place with another coach running between Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell to Amherst and onward to Frances-town. A third person ran a coach to and from Nashua and Lowell; and the defendant agreed with the proprietor of the coach connecting with his line that he would not receive passengers who came from Lowell to Nashua in the coach of such third person on the same day they applied for a passage to places above Nashua. The plaintiff was notified at Lowell of this arrangement, but notwithstanding came from Lowell to Nashua in that coach and then demanded a passage in the defendant's coach to Amherst, tendering the regular fare. It was held that the defendant was bound to receive him, there being sufficient room, and no evidence that the plaintiff was an unfit person to be admitted, or that he had any design of injuring the defendant's business.

CASE. The declaration alleged that the defendant was part owner and the driver of a public stage-coach from Nashua to Amherst and Frances-town; that on the 31st of January, 1837, the plaintiff applied to him to be received into his coach at Nashua, and conveyed from thence to Amherst, offering to pay the customary fare; and that the defendant, although there was room in his coach, refused to receive the plaintiff.

It appeared in evidence that at the time of the grievance alleged there were two rival lines of daily stages running between Lowell, in Massachusetts, and Nashua; that Jonathan B. French was the proprietor of one of those lines, and Nelson Tuttle of the other; that Tuttle's line ran no farther than from Lowell to Nashua; that French and the proprietors of the defendant's line were interested in a contract for

* Reported 10 N. H. 481.

Superior Court of New Hampshire.

carrying the United States mail from Lowell to Francestown, through Amherst (dividing the mail-money in proportion to the length of their respective routes), so as to form one continuous mail route from Lowell to Francestown; that French and the proprietors of the defendant's line had agreed to run their respective coaches so as to form a continuous line for passengers from Lowell, through Amherst, to Francestown, and that their agents and drivers might engage seats for the whole distance at such rates of fare as they thought expedient, and the amount thus received, in instances where they thought proper to receive less than the regular fare, was to be divided between said proprietors in proportion to the length of their respective routes; that it was also agreed that if the defendant's line brought down to Nashua an extra number of passengers, French should see them through, and be at the expense of furnishing extra coaches and horses, if necessary, to convey them to Lowell, and, on the other hand, if French's line brought up an extra number of passengers from Lowell to Nashua, the proprietors of the defendant's line were to do the same for the conveyance of such passengers above Nashua; and that it was further agreed (as Tuttle's line ran no farther than from Lowell to Nashua) by the proprietors of the defendant's line that they would not receive into their coaches, at Nashua, passengers for places above Nashua who came up from Lowell to Nashua on the same day in Tuttle's line, the time of starting from Lowell and arriving at Nashua being the same in both lines.

One of the requisitions of mail contracts is that each line of stage-coaches running into another so as to form a continuous mail line shall give preference to passengers arriving in the line with which it connects, and shall forward them in preference to any others.

There were several other lines which started from Lowell at the same time with the lines before mentioned, running to other places, through Nashua; and it was generally the understanding between their respective proprietors that one line should not take for a part of the distance, where the route was the same, passengers who were going on further in another line; though this understanding had been occasionally interrupted.

The plaintiff being at Lowell on the 31st of January, 1837, took passage and was conveyed to Nashua in Tuttle's line, and immediately on his arrival at Nashua applied to be received into the defendant's coach, and tendered the amount of the regular fare. There was room for the plaintiff to be conveyed to Amherst, but the defendant refused to receive him. The plaintiff was notified by the agent for the line of French and the defendant, at Lowell, previous to taking passage in

 Bennett v. Dutton.

Tuttle's coach for Nashua, that if he wished to go from Nashua to Amherst on that day in the regular mail line he must take the mail line at Lowell, and that if he took passage in Tuttle's line from Lowell to Nashua he would not be received at Nashua into the defendant's coach.

The parties agreed that judgment should be rendered for the plaintiff for nominal damages, or for the defendant, according to the opinion of this court upon these facts.

Clark and G. Y. Sawyer, for the plaintiff; *Baker*, with *C. G. Atherton*, for the defendant.

PARKER, C. J. — It is well settled that so long as a common carrier has convenient room he is bound to receive and carry all goods which are offered for transportation, of the sort he is accustomed to carry, if they are brought at a reasonable time and in a suitable condition.¹ And stage-coaches which transport goods as well as passengers are in respect of such goods to be deemed common carriers, and responsible accordingly.² Carriers of passengers for hire are not responsible, in all particulars, like common carriers of goods. They are not insurers of personal safety against all contingencies except those arising from the acts of God and the public enemy. For an injury happening to the person of a passenger by mere accident, without fault on their part, they are not responsible, but are liable only for want of due care, diligence, or skill. This results from the different nature of the case. But in relation to the baggage of their passengers, the better opinion seems to be that they are responsible like other common carriers of goods.

And we are of opinion that the proprietors of a stage-coach for the regular transportation of passengers for hire from place to place are, as in the case of common carriers of goods, bound to take all passengers who come, so long as they have convenient accommodations for their safe carriage, unless there is a sufficient excuse for a refusal.³

The principle which requires common carriers of goods to take all that are offered, under the limitations before suggested, seems well to apply.

Like innkeepers, carriers of passengers are not bound to receive all comers.⁴ The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion. And his object at the time may furnish a sufficient excuse for a refusal; as, if it be to commit

¹ Story on Bail. 328; *Riley v. Horne*, 5 Bing. 217.

² Story on Bail. 325.

³ *Jencks v. Coleman*, 2 Sumn. 221, *post*, p. 11; *Hollister v. Nowlen*, 19 Wend. 239.

⁴ *Markham v. Brown*, 8 N. H. 523.

Superior Court of New Hampshire.

an assault upon another passenger, or to injure the business of the proprietors.

The case shows the defendant to have been a general carrier of passengers for hire in his stage-coach from Nashua to Amherst at the time of the plaintiff's application. It is admitted there was room in the coach, and there is no evidence that he was an improper person to be admitted, or that he came within any of the reasons of exclusion before suggested.

It has been contended that the defendant was only a special carrier of passengers, and did not hold himself out as a carrier of persons generally; but the facts do not seem to show a holding out for special employment. He was one of the proprietors and the driver of a line of stages from Nashua to Amherst and Francestown. They held themselves out as general passenger carriers between those places. But, by reason of their connection with French's line of stages from Lowell to Nashua, they attempted to make an exception of persons who came from Lowell to Nashua in Tuttle's stage on the same day in which they applied for a passage for the north. It is an attempt to limit their responsibility in a particular case, or class of cases, on account of their agreement with French.

It is further contended that the defendant and other proprietors had a right to make rules for the regulation of their business, and among them a rule that passengers from Lowell to Amherst and onward should take French's stage at Lowell; and that by a notice brought home to the individual, the general responsibility of the defendant, if it existed, is limited.

But we are of opinion that the proprietors had no right to limit their general responsibility in this manner.

It has been decided in New York that stage-coach proprietors are answerable as common carriers for the baggage of passengers; that they cannot restrict their common-law liability by a general notice that the baggage of passengers is at the risk of the owners; and that if a carrier can restrict his common-law liability, it can only be by an express contract.¹ And this principle was applied, and the proprietors held liable for the loss of a trunk, in a case where the passenger stopped at a place where the stages were not changed, and he permitted the stage to proceed without any inquiry for his baggage.² However this may be, as there was room in the defendant's coach, he could not have objected to take a passenger from Nashua, who applied there,

¹ Hollister v. Nowlen, 19 Wend. 234.

² Cole v. Goodwin, 19 Wend. 251.

Vinton v. Middlesex Railroad Company.

merely because he belonged to some other town. That would furnish no sufficient reason, and no rule or notice to that effect could limit his duty. And there is as little legal reason to justify a refusal to take a passenger from Nashua merely because he came to that place in a particular conveyance. The defendant might well have desired that passengers at Lowell should take French's line, because it connected with his. But if he had himself been the proprietor of the stages from Lowell to Nashua, he could have had no right to refuse to take a passenger from Nashua merely because he did not see fit to come to that place in his stage. It was not for him to inquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business; nor was the plaintiff to be punished because he had come to Nashua in a particular manner.

The defendant had good right, by an agreement with French, to give a preference to the passengers who came in French's stage; and as they were carriers of the mail on the same route, it seems he was bound so to do, without an agreement. If after they were accommodated there was still room, he was bound to carry the plaintiff, without inquiring in what line he came to Nashua.

Judgment for the plaintiff.

2. NOT BOUND TO CARRY DRUNKEN PERSONS.

VINTON v. MIDDLESEX RAILROAD COMPANY.*

Supreme Judicial Court of Massachusetts, 1865.

HON. GEORGE T. BIGELOW, *Chief Justice.*

" CHARLES A. DEWEY,	} Associate Justices.
" EBENEZER R. HOAR,	
" REUBEN A. CHAPMAN,	
" HORACE GRAY, JR.,	
" JAMES D. COLT,	

Not bound to carry Drunken Persons.—The conductor of a street railway car may exclude or expel therefrom a person who by reason of intoxication or otherwise is in such a condition as to render it reasonably certain that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offence or annoyance.

* Reported 11 Allen, 304.

 Supreme Judicial Court of Massachusetts.

TORT against a street railway corporation to recover damages for the act of one of their conductors in expelling the plaintiff from a car in which he was a passenger.

At the trial in the Superior Court, before MORTON, J., it appeared that the plaintiff was a passenger in one of the defendants' cars, and was expelled by the conductor. There was no evidence that any rule or regulation had ever been adopted by the defendants, authorizing their conductors to expel passengers for any cause. The defendants introduced evidence tending to show that at the time of the expulsion the plaintiff was intoxicated, and used loud, boisterous, profane, and indecent language towards the conductor, and attempted to strike him, and that he was therefore expelled. But the evidence on this point was conflicting. There were four women in the car as passengers.

The defendants requested the court to instruct the jury, amongst other things, as follows: "If the jury find that the plaintiff was in the defendants' car in a state of intoxication, so as reasonably to induce the conductor to believe that the plaintiff would be an annoyance to the passengers, or if the plaintiff so conducted, or used boisterous, profane, or indecent language, naturally calculated to annoy the passengers, and persisted in so doing after being requested to be quiet, the conductor would be justified in removing him, using no more violence than was necessary to effect his removal."

The judge declined so to rule, and instructed the jury as follows: "If the plaintiff, by reason of intoxication or otherwise, was in act or language offensive or annoying to the passengers, the conductor had a right to remove him, using reasonable force. If the conductor, in the performance of his service as conductor, forcibly removed the plaintiff without justifiable cause, or if, having justifiable cause, he used unnecessary and unreasonable violence, in kind or degree, in removing him, the defendants are liable."

The jury returned a verdict for the plaintiff, with \$1,000 damages; and the defendants alleged exceptions.

L. M. Child (*L. Child* with him), for the defendants.—It is the duty of the proprietors of steamboats and railroads, as common carriers of passengers, to provide for the quiet and comfort of their passengers, and to secure them from annoyance, fright, and terror resulting from the misconduct of their servants or of other passengers.¹ The dis-

¹ *The Commonwealth v. Power*, 7 Metc. 691; *Jencks v. Coleman*, 2 Sumn. 221, *post*, p. 11; *Camden etc. R. Co. v. Burke*, 13 Wend.

611; *Pardee v. Drew*, 25 Wend. 459; *Pickford v. Grand Junction R. Co.*, 8 Me. & W. 372; *Ang. on Car.*, § 525.

Vinton v. Middlesex Railroad Company.

charge of this duty falls within the scope of the employment of the conductor of a railroad car; and if he has good reason to believe that the other passengers cannot otherwise be secured from annoyance, he may remove a passenger.

T. H. Sweetser and W. S. Gardner, for the plaintiff.—The conductor of a car has no right to anticipate that one passenger will become an annoyance to others. If there is no annoyance at the time, and the passenger is conducting himself properly, he cannot be removed. In this case, the defendants did not ask for an instruction that the plaintiff might properly be put off the car if he annoyed the conductor, or if he was intoxicated, but that if he was in a state of intoxication, so as reasonably to induce the conductor to believe that he would be an annoyance, he might be removed. But the conductor himself may have been intoxicated. The ruling that was requested did not provide that the jury should find that the conductor had reason to believe that fact.

No regulations have been established by the defendants, and therefore a passenger agrees simply to behave in a decent and proper manner. If he does so, he has a right to ride; he has a license to enter the car, and a right to stay there until he does something improper. If anybody undertakes to exercise a judgment on this subject, he must be sure to judge right. In this case the defendants ask that if the conductor is afraid that a passenger will do something improper he may expel him. If this rule is adopted, a laboring man, tired and sleepy, may be ejected because the conductor thinks he is intoxicated. In some of the cases cited, express rules of the carriers were violated.

BIGELOW, C. J. — By the instructions under which this case was submitted to the jury, in connection with the refusal of those which were asked for by the defendants, we are led to infer that the learned judge who presided at the trial was of opinion that the defendants and their duly authorized agents had no legal power or authority to exclude or expel from the vehicles under their charge a passenger whose condition and conduct were such as to give a reasonable ground of belief that his presence and continuance in the vehicle would create inconvenience and disturbance, and cause discomfort and annoyance to other passengers. Such certainly were the result and effect of the rule of law laid down for the guidance of the jury at the trial. We are constrained to say that we know of no warrant, either in principle or authority, for putting any such limitation on the right and authority of the defendants as common carriers of passengers, or of their servants acting within the scope of their employment.

Supreme Judicial Court of Massachusetts.

It being conceded, as it must be under adjudicated cases, that the defendants, as incident to the business which they carried on, not only had the power but were bound to take all reasonable and proper means to insure the safety and provide for the comfort and convenience of passengers, it follows that they had a right, in the exercise of this authority and duty, to repress and prohibit all disorderly conduct in their vehicles, and to expel or exclude therefrom any person whose conduct or condition was such as to render acts of impropriety, rudeness, indecency, or disturbance either inevitable or probable. Certainly the conductor in charge of the vehicle was not bound to wait until some overt act of violence, profaneness, or other misconduct had been committed, to the inconvenience or annoyance of other passengers, before exercising his authority to exclude or expel the offender. The right and power of the defendants and their servants to prevent the occurrence of improper and disorderly conduct in a public vehicle is quite as essential and important as the authority to stop a disturbance or repress acts of violence or breaches of decorum after they have been committed and the mischief of annoyance and disturbance has been done.

Indeed if the rule laid down at the trial be correct, then it would follow that passengers in public vehicles must be subjected to a certain amount or degree of discomfort or insult from evil-disposed persons before the right to expel them would accrue to a carrier or his servant. There would be no authority to restrain or prevent profaneness, indecency, or other breaches of decorum in speech or behavior, until it had continued long enough to become manifest to the eyes or ears of other passengers. It is obvious that any such restriction on the operation of the rule of law would greatly diminish its practical value. Nor can we see that there is any good reason for giving so narrow a scope to the authority of carriers of passengers and their agents as was indicated in the rulings at the trial. The only objection suggested is that it is liable to abuse and may become the instrument of oppression. But the same is true of many other salutary rules of law. The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers if he was admitted into a public vehicle or allowed longer to remain within it.

Exceptions sustained.

Thurston v. Union Pacific Railroad Company.

3. NOT BOUND TO CARRY GAMBLERS WHO SEEK TO COME ON BOARD TO PLY THEIR VOCATION.

THURSTON v. UNION PACIFIC RAILROAD COMPANY.*

*United States Circuit Court, District of Nebraska, 1877.**Hon. ELMER S. DUNDY, *District Judge.*

Carrier may refuse to carry Gamblers. — Gamblers and monte-men whose purpose in travelling upon a railway train is to ply their vocation may be excluded. But if after such a person has purchased a ticket the servants of the company refuse to receive him on board the train, unless the company tender back the price of the ticket he may recover the same together with costs of suit.

It was alleged, and not denied, that the plaintiff had purchased from the road, for fifty cents, a ticket for crossing the river on the transfer train, and that when the train was about starting he attempted to board it but was prevented. He also purchased, for ninety cents, from the company a ticket good on another road, but was forcibly ejected from the train, and obliged to remain in Omaha several days before he could safely get away, for which he asked \$5,000 damages. The defendant admitted that the necessary force (but no more) was used to prevent his entering the train. It was claimed that he had been for years a notorious gambler, — a “monte-man,” so called, — and was then engaged in travelling on the defendant’s road for the purpose of plying that calling, and was about to enter the train for that purpose. This the defendant denied. The question was whether the defendant had the right to exclude gamblers from its trains. Upon this point the charge of the court is given below.

John I. Redick, for the plaintiff; *Mr. Poppleton* and *Mr. Wakely*, for the defendant.

DUNDY, J. — The railway company is bound, as a common carrier, when not overcrowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for the purpose of interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons

* Reported 4 Dill. 321.

 United States Circuit Court, Nebraska.

infected with contagious diseases, to the danger of other passengers. The person must be upon lawful and legitimate business. Hence defendant is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the State laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains; and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled.

Whether the plaintiff was going upon the train for gambling purposes, or whether from his previous course the defendant might reasonably infer that such was his purpose, is a question of fact for the jury. If they find such to have been the case, they cannot give judgment for any more than the actual damage sustained.

After the ticket is purchased and paid for, the railroad company can only avoid compliance with its part of the contract by the existence of some legal cause or condition which will excuse it. The company should, in the first case, refuse to sell tickets to persons whom it desires and has the right to exclude from the cars, and should exclude them if they attempt to enter the car without tickets. If the ticket has been inadvertently sold to such person, and the company desires to rescind the contract for transportation, it should tender the return of the money paid for the ticket. If it does not do this, plaintiff may, under any circumstances, recover the amount of his actual damage, viz., what he paid for the ticket, and perhaps necessary expenses of his detention.

In this case the jury rendered a verdict for actual damages (\$1.74) and costs, the company not having tendered the money.

Judgment on verdict.

4. NOT BOUND TO CARRY A DRUMMER FOR A RIVAL LINE.

JENCKS v. COLEMAN.*

Circuit Court of the United States, Rhode Island, 1835.

HON. JOSEPH STORY, *Associate Justice of the Supreme Court.*

“ JOHN PITMAN, *District Judge.*

1. **No Obligation to carry a Drummer for a Rival Line.**—Whilst the proprietors of a steamboat carrying passengers for hire are bound as common carriers, if they

* Reported 2 Sumn. 221.

Jencks v. Coleman.

have suitable accommodations, to receive on board and carry all persons to whose character and conduct there is no reasonable objection, yet they are under no obligation to receive and carry one who seeks to come on board for the purpose of soliciting patronage for a rival line.

2. **Case in Judgment.**—The plaintiff was the known agent of the Tremont line of stage-coaches; the proprietors of the steamboat Benjamin Franklin had, as he well knew, entered into a contract with the Citizens' Stage-Coach Company to carry passengers between Boston and Providence in connection with and to meet the steamboats. The plaintiff had been in the habit of coming on board the steamboat at Providence and Newport for the purpose of soliciting passengers for the Tremont line. It was held that if the jury should be of opinion that the above contract was reasonable and *bonâ fide*, and not entered into for the purpose of an oppressive monopoly, and that the exclusion of the plaintiff was a reasonable regulation in order to carry this contract into effect, the proprietors of the steamboat would be justified in refusing to take the plaintiff on board.

CASE, for refusing to take the plaintiff on board of the steamboat Benjamin Franklin (of which the defendant was commander) as a passenger from Providence to Newport. Plea, the general issue.

The facts, as they appeared at the trial, were substantially as follows: That the plaintiff was the agent of the Tremont line of stages running between Providence and Boston; that his object was to take passage in the boat to Newport, and then go on board the steamboat President, on her passage from New York to Providence, on the next morning, for the purpose of soliciting passengers for the Tremont line of stages for Boston. This the proprietors of the President and Benjamin Franklin had prohibited, and had given notice that they would not permit agents of that line of stages to take passage in their boats for that purpose. The reason assigned for such prohibition was that it was important for the proprietors of the steamboats that the passengers from their boats for Boston should find at all times, on their arrival at Providence, an immediate and expeditious passage to Boston. To insure this object, the Citizens' Coach Company had contracted with the steamboat proprietors to carry all the passengers who wished to go, in good carriages at reasonable expedition and prices; and the commanders of the steamboats were to receive the fare and make out way-bills of the passengers for the Citizens' Coach Company. This they continued to perform. And in order to counteract the effect of this contract, which had been offered the Tremont line and declined, that line placed an agent on board the boats to solicit passengers for their coaches; and on being complained to by the Citizens' Coach Company, the proprietors of the steamboats interdicted such agents from coming on board their boats, and in this instance refused to permit the plaintiff to take passage in the boat for Newport though he tendered the customary fare.

United States Circuit Court, Rhode Island.

The cause was argued by *R. W. Greene* and *Daniel Webster* for the plaintiff, and by *Rivers* and *Whipple* for the defendants.

For the plaintiff, it was contended that steamboat proprietors were common carriers, and every person conducting himself with propriety had a right to be carried unless he had forfeited that right. The plaintiff, in this instance, did conduct himself with propriety, and had not forfeited his right to be carried, by any improper misconduct. The steamboat proprietors and Citizens' Coach Company had attempted to establish a monopoly, which should not be countenanced, it being against the public interest. Such a monopoly operated to increase the price and prolong the time of passage from Providence to Boston; while open competition promoted the public interest and convenience, by reducing the fare and expediting the passage. The plaintiff, in this instance, requested to be conveyed from Providence to Newport; during which passage, it was well known, no passengers were to be solicited, — that was to be done only on the passage from Newport to Providence.

For the defendant, it was contended that the contract made by the steamboat proprietors and the Citizens' Company was legal, and subserved the public convenience and the interests of the proprietors of the boats and stages; it insured to the passengers expeditious passages at reasonable prices; that the regulation excluding the agents of the Tremont line of stages from the steamboats was legal and just, because it was necessary to promote the foregoing objects, to wit, the public convenience and the interests of the proprietors of both the boats and stages. Of this interdiction the plaintiff had received notice, and had no legal right to complain.

STORY, J., in summing up to the jury, after recapitulating the evidence, said: There is no doubt that this steamboat is a common carrier of passengers for hire; and therefore the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations and there was no reasonable objection to the character or conduct of the plaintiff. The question, then, really resolves itself into the mere consideration whether there was in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers and for the due arrangements of their business. The proprietors have not only this right, but the further right to consult and provide for their own interests in the management of such boats, as a common incident to

Jencks v. Coleman.

their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful, or dissolute, or suspicious; and, *à fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them.

While, therefore, I agree that steamboat proprietors, holding themselves out as common carriers, are bound to receive passengers on board under ordinary circumstances, I at the same time insist that they may refuse to receive them if there be a reasonable objection. And as passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under ordinary circumstances, impliedly contracts to obey such regulations, and may justly be refused a passage if he wilfully resists or violates them.

Now, what are the circumstances of the present case? Jencks (the plaintiff) was at the time the known agent of the Tremont line of stage-coaches. The proprietors of the Benjamin Franklin had, as he well knew, entered into a contract with the owners of another line (the Citizens' Stage-Coach Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connection with and to meet the steamboats plying between New York and Providence and belonging to the proprietors of the Franklin. Such a contract was important, if not indispensable, to secure uniformity, punctuality, and certainty in the carriage of passengers on both routes, and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence and going therein to Newport; and commonly of coming on board at Newport and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors. He had the fullest notice that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board as in the declaration mentioned, there was every reason to presume that he was on board for his ordinary purposes as agent. It has been said that the proprietors had no right to inquire into his intent or motives. I cannot admit that

United States Circuit Court, Rhode Island.

point. I think that the proprietors had a right to inquire into such intent and motives, and to act upon the reasonable presumptions which arose in regard to them. Suppose a known or suspected thief were to come on board, would they not have a right to refuse him a passage? Might they not justly act upon the presumption that his object was unlawful? Suppose a person were to come on board who was habitually drunk, and gross in his behavior and obscene in his language, so as to be a public annoyance, might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be.

It has been said by the learned counsel for the plaintiff that Jencks was going from Providence to Newport, and not coming back; and that, in going down, there would, from the very nature of the object, be no solicitation for passengers. That does not necessarily follow; for he might be engaged in making preliminary engagements for the return of some of them back again. But supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think that the proprietors of the steamboats were not bound to take a passenger from Providence to Newport whose object was, as a stationed agent of the Tremont line, thereby to acquire facilities to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry, whose object it is to commit a trespass upon his lands? A case still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup, at his house, and an agent is employed by a rival house, at the distance of a few miles, to decoy the passengers away the moment they arrive at the inn; is the innkeeper bound to entertain and lodge such agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not.

It has been also said that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose; and especially if it will facilitate transportation of passengers, and increase the patronage of their steamboats. I do not say that they have a right to act oppressively in such cases. But certainly they may in good faith make such contracts, to promote their own as well as the public interests.

Jencks v. Coleman.

The only real question, then, in the present case, is whether the conduct of the steamboat proprietors has been reasonable and *bonâ fide*. They have entered into a contract with the Citizens' line of coaches to carry all their passengers to and from Boston. Is this contract reasonable in itself, and not designed to create an oppressive and mischievous monopoly? There is no pretence to say that any passenger is bound to go to or from Boston in the Citizens' line. He may act as he pleases. It has been said by the learned counsel for the plaintiff that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here whether the contract with the Citizens' line was indispensable, or absolutely necessary, in order to insure the carriage of the passengers to and from Boston. But the true question is whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself, and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise, for the plaintiff.

Webster, for the plaintiff, then requested the court to charge that "the jury must be satisfied that this agreement was necessary or clearly expedient for the public interest and the interest of the proprietors of the boats, or otherwise the captain of the boat could not enforce it by refusing the plaintiff a passage; or, that the defendant must show that the substantial interest of the proprietors, or of the public, required an arrangement such as that they entered into, in order to justify their refusal to carry the plaintiff for the cause assigned."

The court refused to give instruction in the manner and form as prayed; but did instruct the jury that it is not necessary for the defendant to prove that the contract in the case was necessary to accomplish the objects therein stated, but it is sufficient if it was entered into by the steamboat proprietors *bonâ fide*, and purely for the purpose of their own interest and the accommodation of the public, from their belief of its necessity or its utility. If the jury should be of opinion that under all the circumstances of the case it was a reasonable contract, and the exclusion of the plaintiff was a reasonable and proper regulation to carry it into effect on the part of the steamboat proprietors, then their verdict ought to be in favor of the defendant; otherwise, in favor of the plaintiff.

Verdict for defendant.

 Quantum of Damages.

5. EXPULSION OF PASSENGER EXILED BY VIGILANCE COMMITTEE.

PEARSON *v.* DUANE.**Supreme Court of the United States, 1866.*Hon. SALMON PORTLAND CHASE, *Chief Justice.*

" JAMES M. WAYNE,	} <i>Associate Justices.</i>
" ROBERT COOPER GRIER,	
" NOAH H. SWAYNE,	
" DAVID DAVIS,	
" SAMUEL NELSON,	
" NATHAN CLIFFORD,	
" SAMUEL F. MILLER,	
" STEPHEN J. FIELD,	

1. **Refusal of Ship-master to carry Passenger.**—The libellant was expelled from the city of San Francisco by a Vigilance Committee, and was forcibly put on board an outgoing steamer and landed at the Mexican port of Acapulco. With the determination of returning to San Francisco in defiance of the Vigilance Committee, he got on board a steamer destined for that port, of which the respondent was master. After the steamer had put to sea, his identity and the fact of his expulsion from San Francisco were discovered, and the respondent, with a view of preventing him from returning to San Francisco, believing that he would be killed by the Vigilance Committee if he returned, put him on board another steamer, which again landed him at Acapulco. It was held that, having been permitted to go upon the respondent's vessel without objection, and having tendered his fare and otherwise demeaned himself properly, the respondent could not lawfully refuse to carry him, and that he was entitled to recover damages; although it seems that the respondent might have refused to receive him on board the ship before it sailed.

2. **Quantum of Damages.**—Under such circumstances, it was held that the libellant was entitled to recover only such damages as might be reasonably supposed to have flowed immediately from the act of the respondent in expelling him from his vessel, and not those remote damages which grew out of his subsequent wanderings and sufferings. Accordingly an award of \$4,000 damages made by the court below was reduced to \$50.

In the month of June, 1856, the steamship Stevens, a common carrier of passengers, of which Pearson was master, on her regular voyage from Panama to San Francisco, arrived at the intermediate port of Acapulco, where Duane got on board with the intention of proceeding to San Francisco. He had shortly before this been banished from that city by a revolutionary yet powerful and organized body of men, called "The Vigilance Committee of San Francisco," upon penalty of death in case of return. This committee had, in the forepart of June, against his will, placed him on the Golden Age, a steamer in the harbor

* Reported 4 Wall. 605.

Pearson v. Duane.

of San Francisco destined for Panama, with directions that he should be conveyed beyond the limits of California; and he was forcibly carried to the Mexican port of Acapulco. The presence of the Stevens afforded the first opportunity to get back, which he was anxious to embrace, being willing to encounter the risk to which his return might expose him. Duane went openly on the boat, at the public gangway, and talked freely with some of the officers and passengers. It is not certain that the master knew of his being aboard until after the ship got to sea, but no directions had been given for his exclusion; and although he was without a ticket, or money to buy one, yet a passenger who had the means offered to pay the purser his fare, who declined receiving it.

It was usual for those persons who wished to secure a passage to procure a ticket at Acapulco, but there was no imperative rule of the ship requiring it, and the customary fare was often paid to the purser after the boat had left the port.

There was no evidence that Duane would have been excluded had the master been aware that he was on board before he left Acapulco, for it was quite clear that the circumstances of his banishment were unknown at that time.

The master, Pearson, was aware that the Vigilance Committee were in control of San Francisco, and ascertained in some way that Duane had been expelled by them from California, and if he returned would be in danger of losing his life. Having learned this, he resolved to put Duane aboard the first ship he met, and send him back to Acapulco. The steamer Sonora, commanded by Capt. Whiting, and one of the same line of steamers of which Pearson was master, very soon came in sight and was stopped. Whiting informed Pearson that he had orders not to carry back any banished person, and that Duane *would certainly be executed* if he returned, and advised that he should be sent to the Sonora, and he would endeavor to persuade him to go on with him.

Thereupon Duane was transferred to the Sonora, and landed at Acapulco. The transfer was effected without any personal indignity to Duane, who at first resisted, but was induced to yield to superior force by friendly counsels.

Duane did not return to California until the month of February, 1860. The Vigilance Committee no longer existed; and he then filed a libel in admiralty for damages, in the District Court of the Northern District there, setting forth essentially the facts above stated; that having been expelled as he was from the Stevens, all efforts to get aboard vessels going to San Francisco were unavailing; that he went

Supreme Court of the United States.

thence to Aspinwall, in the Republic of New Grenada, to try and get passage thence to San Francisco, but that a line of steamers previously existing there, and on which he expected to go, had been discontinued, its last vessel having set off two or three days before his arrival; that finally, through charity, he obtained a passage to New York, in which city he was without money or means, his character and reputation blasted, and himself a dependent on charity for subsistence; and was for several months confined in the hospital there, physically unable to attempt the voyage to San Francisco until February, 1860.

By the twelfth article of his libel, he assigned as a reason for delay in bringing his action the state of things in San Francisco, the numerous executions there by the Vigilance Committee, and his own belief that if he returned his life would be put in jeopardy, — a belief which, he alleged, “existed up to the time of his departure from New York to California.”

The answer, besides a defence from lapse of time, asserted that the libellant was not “a good or law-abiding citizen of San Francisco;” and that he had “secretly, and without any right or authority so to do, got on board of the Stevens, and remained secreted on board as a stow-away;” and that the defendant, in sending the libellant back on the Sonora, had been influenced by humane motives.

The District Court decreed in favor of Duane, with \$4,000 damages; a decree affirmed in the Circuit Court. Appeal.

Messrs. *Lyon* and *Alexander Hamilton, Jr.*, for the appellant; Mr. *Ashton*, for the appellee.

Mr. Justice DAVIS delivered the opinion of the court. — This case is interesting, because of certain novel views which this court is asked to sustain. Two questions arise in it: *First*, Was the conduct of Pearson justifiable? *Second*, If not, what should be the proper measure of damages? It is contended, as the life of Duane was in imminent peril in case of his return to San Francisco, that Pearson was justified, in order to save it, in excluding him from his boat, notwithstanding Duane was willing to take his chances of being hanged by the Vigilance Committee. Such a motive is certainly commendable for its humanity, and goes very far to excuse the transaction, but does not justify it. Common carriers of passengers, like the steamship Stevens, are obliged to carry all passengers who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal.¹

¹ *Jencks v. Coleman*, 2 Sumn. 221, *ante*, p. 11; *Bennett v. Dutton*, 10 N. H. 486, *ante*, p. 2.

Pearson v. Duane.

If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case, Duane could have been well refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty should he be returned to a city where lawless violence was supreme.

But this refusal should have preceded the sailing of the ship. After the ship had got to sea it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. This was not done; and the defence that Duane was a "stowaway," and therefore subject to expulsion at any time, is a mere pretence, for the evidence is clear that he made no attempt to secrete himself until advised of his intended transfer to the Sonora. Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose character is bad, they cannot expel him after having admitted him as a passenger and received his fare, unless he misbehaves during the journey.¹ Duane conducted himself properly on the boat until his expulsion was determined, and when his fare was tendered to the purser he was entitled to the same rights as other passengers. The refusal to carry him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it.

But the sum of \$4,000 awarded as damages, in this case, is excessive, bearing no proportion to the injury received. Duane is entitled to compensation for the injury done him by being put on board the Sonora, so far as that injury arose from the act of Pearson in putting him there. But the outrages which he suffered at the hands of the Vigilance Committee, his forcible abduction from California and transportation to Acapulco, the difficulties experienced in getting to New York, and his inability to procure a passage from either Acapulco or Panama to San Francisco, cannot be compensated in this action. The obstructions he met with in returning to California were wholly due to the circumstances surrounding him, and were not caused by Pearson. Every one, doubtless, to whom he applied for passage knew the power

¹ *Coppin v. Braithwaite*, 8 Jur. 875. [This language would seem to be open to criticism. See *Vinton v. Middlesex etc. R. Co.*, 11 Allen, 304, *ante*, p. 6. Compare also the principle of the decision in *Eckert v. Long*

Island R. Co., 43 N. Y. 502; *s. c.* 57 Barb. 555, and a late case of the Supreme Judicial Court of Massachusetts, — *Linnehan v. Sampson*, 126 Mass. 506, *s. c.* 8 Cent. L. J. 442. — ED.]

Supreme Court of the United States.

of the Vigilance Committee, and were afraid to encounter it by returning an exile against whom the sentence of death had been pronounced. Pearson had no malice or ill-will towards Duane; and, as the evidence clearly shows, excluded him from his boat in the fear that if returned to San Francisco he would be put to death. It was sheer madness for Duane to seek to go back there. Common prudence required that he should wait until the violence of the storm blew over and law and order were restored.

This course he finally pursued, and he did not return to California until February, 1860. If he believed when expelled from the Stevens that Pearson had done him a great wrong, he certainly did not when he filed the libel in this case, for the twelfth article is as follows: "That when libellant was so banished from the State of California as aforesaid by the said Vigilance Committee, he was threatened with the penalty of death should he ever return to said State; that libellant was aware that said committee had caused to be executed a number of persons, without color or warrant of law or right, and that the said committee had the power and ability to put in execution their threats, and libellant believed, and had reason to believe, from the conduct of said R. H. Pearson as aforesaid, and the treatment he received from the hands of said Vigilance Committee, and their threats as aforesaid, which were well known to said Pearson, that should he return to said State his return, if attempted or if successful, would be impeded and resisted, and his life put in peril and jeopardy, which belief existed up to the time of his departure from New York to California." This is the sworn statement of Duane, that his life was in peril if he returned to California at an earlier day; for the conduct of Pearson to which he refers was predicated on a corresponding belief. It is true this article in the libel was introduced by way of excuse for not having sooner brought the suit, but the admissions in it are proper evidence for all purposes. If so, it is clear that the legal injury which Duane suffered at the hands of Pearson can be compensated by a small amount of money. On a review of the whole case, we are of opinion that the damages should be reduced to \$50.

It is ordered that this cause be remitted to the Circuit Court for the District of California, with directions to enter a decree in favor of the appellee for \$50. It is further ordered that each party pay his own costs in this court.

Order accordingly.

O'Brien v. Boston and Worcester Railroad Company.

6. NOT BOUND TO CARRY PERSON WHO HAS JUST BEEN EXPELLED
FOR GOOD CAUSE.

O'BRIEN v. BOSTON AND WORCESTER RAILROAD COMPANY.*

Supreme Judicial Court of Massachusetts, 1860.

HON. LEMUEL SHAW, *Chief Justice.*

" CHARLES A. DEWEY,	} <i>Associate Justices.</i>
" THERON METCALF,	
" GEORGE T. BIGELOW,	
" PLINY MERRICK,	
" EBENEZER R. HOAR,	

1. **No Duty to carry Passenger who has been rightfully ejected from the Train.**—A passenger who has been rightfully ejected from a railway train cannot by again reëntering the cars and tendering the fare acquire a right to be carried.
2. **Regulation concerning the Ejection of Persons who refuse to pay Fare.**—A regulation by a railway company requiring conductors to eject from the cars persons who refuse to pay their fares, and not to accept their fare after such ejection if offered at that time or after the cars have been stopped, is, under the Revised Statutes of Massachusetts, chap. 39, sect. 83, a proper regulation; and in an action for damages by a person who has been properly ejected for refusing to pay his fare, and who has immediately gone upon the same train and offered to pay his fare, and has been ejected a second time, it is error to exclude evidence of such a regulation.

ACTION OF TORT against a railroad corporation and their conductor for ejecting the plaintiff from their cars.

At the trial in the Court of Common Pleas in Middlesex, at December term, 1858, before SANGER, J., the evidence tended to show that the plaintiff bought at Cardaville a passenger's ticket to Brighton, and also a return ticket from Brighton to Cardaville; that he went to Brighton on the train, and thence to Boston; that in the afternoon of the same day he entered the defendants' cars at Boston as a passenger, intending to go to Cardaville, and took his seat; that before the train reached Brighton, the conductor, in the due course of his duty, in taking the tickets of the passengers and collecting their fares, came to the plaintiff, who up to this time had conducted himself properly, and asked him for his ticket; that the plaintiff handed him the return ticket which he had purchased as above stated, and the conductor said that it was not good. The testimony of what followed was conflicting. The plaintiff contended that the evidence showed that when the con-

* Reported 15 Gray, 20.

Supreme Judicial Court of Massachusetts.

ductor objected to the ticket, the plaintiff offered to pay his fare either from Boston to Brighton or the whole distance from Boston to Cardaville, before the bell was rung to stop the cars or any attempt was made to eject him from them; that he made the same offer after the bell was rung and before he was ejected; but that the conductor refused to receive the fare and forcibly ejected him. The defendants contended that the evidence showed that the conductor demanded the fare either from Boston to Brighton, or, if the plaintiff preferred so to pay, from Boston to Cardaville; that the plaintiff at first refused to pay any thing; that upon his persisting in his refusal to pay the fare, the conductor rang the bell and stopped the cars; that after the bell had been rung for stopping the cars, and before and after the cars were stopped, the plaintiff offered to pay the demanded fare, but the conductor refused to receive it, and forcibly ejected the plaintiff from the car and put him down on the railroad track. It appeared that the train had been stopped only for the purpose of ejecting the plaintiff; that the conductor gave the signal for the cars to start and proceeded in his duty of collecting the fares, and the cars started on; that the plaintiff went to the rear car and got upon it; that the conductor was immediately informed that the plaintiff had got into that car, and at once went to it, and although the plaintiff, before any attempt was made to stop the cars a second time, offered to pay whatever fare the conductor should demand, the conductor refused to receive it, stopped the cars, and forcibly ejected the plaintiff a second time.

The defendants offered to show that, by the regulations of the corporation, conductors were to eject persons who refused to pay their fare, and after such ejection were not to accept their fare at that time if offered after the cars had been stopped. But the judge rejected the evidence.

The judge instructed the jury that, as there was no question but that the plaintiff was obliged to pay his fare from Boston to Brighton, the conductor, after demanding the fare and waiting a reasonable time for the plaintiff to pay, had a right, on the plaintiff's refusal to pay, to ring the bell to stop the cars for the purpose of ejecting him; but after the bell was thus rung, any offer or tender of the fare, not accepted by the conductor, was made too late; and that, notwithstanding such offer or tender of fare, the conductor had a right to stop the cars and eject the plaintiff therefrom, using no more force than was necessary for the purpose.

In regard to the second ejection, the jury were instructed that the agents of the corporation might, using only such force as was necessary,

O'Brien v. Boston and Worcester Railroad Company.

eject from their cars any passenger who wrongly refused to pay his fare, which was properly demandable, and which had been demanded in a proper manner; that after so ejecting him they could stay by, if they pleased, and prevent him from entering the cars again at that time and place; that the passenger thus properly ejected was not thereby forever incapacitated from riding in the cars of the corporation, but might, if he conducted himself properly, and paid his fare, or tendered it seasonably, ride in a subsequent train on another day or on the same day; or if the ejection was near a station, and if, after the ejection, for any reason, the train, having reached that station, was delayed there until the passenger came up, he might enter the cars there, and be carried if he conducted himself properly; and so if after the ejection the cars should move on and for any reason become stationary, and the ejected passenger should overtake them, and enter them without objection, he might continue therein if he conducted himself properly and paid his fare or seasonably offered to pay it; that it might be difficult to fix the point of time, as a matter of fact, how soon after the ejection the ejected passenger might reënter the cars with the right and privilege of ordinary passengers, but it would be when the transaction of the ejection was completely terminated; that when that ended a new state of things began, and it was for the jury to find upon all the proof whether the transaction of the ejection was terminated before the plaintiff reëntered the cars; that unless it was so terminated the plaintiff could not recover any damages for the second ejection, if they should find the first ejection to have been lawfully made; and if it was so terminated (and the burden of proof was upon the plaintiff to establish the fact by a preponderance of the proof), and the plaintiff entered the cars without objection, although without any express permission, and although it was immediately after the ejection and on the same train, and not at any station or customary stopping-place, he was rightfully there; and, conducting himself properly and paying his fare, or seasonably offering to pay his fare, he had a right to be carried, and could recover damages for his ejection.

The jury found the first ejection justifiable, the second unjustifiable, and rendered a verdict for the plaintiff for \$150. The defendants alleged exceptions.

G. S. Hale, for the defendants; *A. B. Underwood*, for the plaintiff.

BIGELOW, J. — The correctness of the instructions given to the jury in this case can be readily ascertained by considering the nature of the contract entered into between the plaintiff and the defendants, and the respective rights and duties of the parties under it. On entering the

Supreme Judicial Court of Massachusetts.

cars of the defendants at Boston, the plaintiff had a right to be carried thence to his place of destination in that train on paying the usual rate of fare. This fare he was bound to pay according to the regulations of the company, or on a reasonable demand being made therefor. If he failed to do so, then his rights under the contract ceased; he had forfeited them by his own act; and, having himself first broken the contract, he could not insist on its fulfilment by the defendants. This is the rule of common law. It is also expressly enacted in Stats. 1849, c. 191, § 2, that no person who shall not, upon demand, first pay the established toll or fare shall be entitled to be transported over a railroad. The defendants, therefore, were not bound to transport him farther, but were justified in ejecting him from the cars by the use of all lawful and proper means.¹ Nor could he regain his right to ask of the defendants to perform their contract by his offer to pay the fare after his ejection. They were not bound to accept performance after a breach. The right to demand the complete execution of the contract by the defendants was defeated by the refusal of the plaintiff to do that which was either a condition precedent or a concurrent consideration on his part, and the non-performance of which absolved the defendants of all obligation to fulfil the contract. After being rightfully expelled from the train, he could not again enter the same cars, and require the defendants to perform the same contract which he had previously broken. The right to refuse to transport the plaintiff farther, and to eject him from the train, would be an idle and useless exercise of legal authority if the party who had hitherto refused to perform the contract by paying his fare when duly demanded could immediately reënter the cars and claim the fulfilment of the original contract by the defendants. Besides, the defendants are not bound to receive passengers at any part of their route, but only at the regular stations or appointed places on the line of the road, established by them at reasonable distances for the proper accommodation of the public.² The plaintiff had therefore no right to enter the cars at the place where the train was stopped for the purpose of ejecting him. A person who had committed no breach of contract could not claim any such right; *à fortiori* the plaintiff could not. It follows that, on the facts stated in the exceptions, the plaintiff proved no just claim for damages against the defendants, and the instructions given to the jury, under which the verdict was rendered, were clearly erroneous.

¹ Ang. on Car., §§ 525, 609; Redf. on Rys. 26, 261; *Stephen v. Smith*, 29 Vt. 160.

² Ang. on Car., § 527 a; *Murch v. Concord R. Co.*, 29 N. H. 39.

Notes.

The court also erred in rejecting the evidence of the regulations established by the defendants concerning passengers who refused to pay their fare. The right to establish all needful and proper regulations is vested in the defendants by law;¹ and they should have been permitted to prove them, as part of their justification.

Exceptions sustained.

NOTES.

§ 1. **Who is a Common Carrier of Passengers.**—A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage. To constitute one a common carrier it is necessary that he should hold himself out as such. This may be done not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment. Railroad companies, the owners of ships, steamboats, ferries, omnibuses, street cars, and stage-coaches, are usually common carriers of passengers.² The common carrier may transport his passengers only within the limits of a town, as the owner of an omnibus or other vehicle plying between a railroad depot and a hotel,³ or street cars running upon a line whose terminal points are within the limits of the same city; or he may carry between adjacent or remote cities in the same country;⁴ or the place to which he holds himself out to carry his passengers may be in a foreign country.⁵ The passenger's destination is immaterial in deciding whether the carrier is a common carrier of passengers or whether he is a private or special carrier. The carrier may be both a common carrier of passengers and a common carrier of goods, by the same conveyance and at the same time. And he may also make reasonable rules by which he carries goods in one conveyance and passengers in another, in which case he is a common carrier of passengers or of goods only in the respective conveyances which he has assigned to those purposes. Thus, in the case of railroad companies: if as a general rule they confine the transportation of goods to what are called freight trains, and the conveyance of passengers to regular passenger trains, they are common carriers of goods as to the former, and of passengers as to the latter. Yet they may by usage or practice become common carriers of goods on passenger trains and common carriers of passengers on freight trains, although these trains may be used mainly for the purposes for which they were originally intended. Thus, if they are in the habit of carrying passengers for hire, such as emigrants, or drovers, or any other class of persons, upon

¹ Rev. Stats., chap. 39, § 83; *The Commonwealth v. Power*, 7 Metc. 602.

² *Nashville etc. R. Co. v. Messino*, 1 Sneed, 220; *Hanley v. Harlem R. Co.*, 1 Edm. 359; *Peixotti v. McLaughlin*, 1 Strobh. L. 463; *Slimmer v. Merry*, 23 Iowa, 90; *Richards v. Westcott*, 2 Bosw. 589; *Jencks v. Coleman*, 2 Sumn. 221, *ante*, p. 11; *Bretherton v. Wood*,

3 Brod. & B. 54; *s. c.* 9 Price, 408; *Hollister v. Nowlen*, 19 Wend. 234; *Bennett v. Dutton*, 10 N. H. 481, *ante*, p. 2; *Lovett v. Hobbs*, 2 Show. 127.

³ *Parmelee v. Lowitz*, 74 Ill. 116.

⁴ *Richards v. Westcott*, 2 Bosw. 589.

⁵ *Benett v. Peninsular etc. Steamboat Co.*, 6 C. B. 775.

Free Passengers — Contractors, etc.

freight trains, they become common carriers of that class of passengers by freight trains, and thereby assume the liabilities of common carriers indifferently both of persons and property by such trains.¹

The admission to a railroad train, although payment is received for the passenger's carriage, will not of itself make those operating the train, and who receive the pay, common carriers. Thus, in a case where the defendants, who were contractors for building a railroad, were running a construction-train to which was attached a caboose-car, in which the men connected with the train had their "sleeping-bunks" and wherein the tools used by those engaged in the construction of the railroad were stored, and in which car persons were sometimes carried, although the contractors did not wish to carry passengers, who sometimes were charged fare, but not always, and the conductor of the train received on board of the caboose-car a person who paid his fare for the distance he wished to ride, and while being carried was injured by the car being thrown off the track, it was held that the defendants were not general carriers of passengers any more than they were common carriers of goods. They were but contractors to build a road. The carriage of anybody or any thing was neither their principal and direct business nor an occasional and incidental employment.² In another case where the person injured was being carried on a construction-train, the railroad company was held to sustain the relation of common carrier towards him.³ If, however, a passenger is received on board of a train in the usual way, which to all appearances is owned by a common carrier of passengers, and is treated by the agents of the company as a passenger, it will devolve upon the company to show that it is not a common carrier. Thus, in an action for an injury to a passenger upon a railroad train, there was evidence tending to show that the defendant company was duly organized and incorporated and its road constructed and put in operation, and that trains were being run and business transacted upon it, and men being employed to keep it in repair; that on the day of the accident which occasioned the injury the plaintiff purchased a ticket at a station on a connecting road to a station on the defendant's road, and that after the train reached the defendant's road the conductor recognized the plaintiff's ticket as entitling him to a ride over the road, taking up the ticket in the usual way and allowing him to proceed without objection, soon after which the injury was received. It was held that this evidence made out a *prima facie* case that the defendant was a common carrier operating its road, and that it had undertaken to transport the plaintiff over it; and that in the absence of any proof by the defendant that the road was not its road and was not being operated in the usual way of operating railroads, which proof would be peculiarly within the defendant's knowledge, the jury would be fully justified in finding that issue in the affirmative.⁴ But a railroad company cannot assume the position of a common carrier towards a person's baggage who refuses to occupy the relation of passenger towards it. Thus, where a person went with his baggage to a train, and the baggage-master refused to check it until he had purchased his tickets, and thereupon he went to procure tickets, and while he was gone the baggage-master weighed his baggage, and on his

¹ *Flinn v. Phila. etc. R. Co.*, 1 Houst. (Del.) 469.

³ *Nashville etc. R. Co. v. Messino*, 1 Sneed, 220.

² *Shoemaker v. Kingsbury*, 12 Wall. 369.

⁴ *Bixby v. Montpelier etc. R. Co.*, 49 Vt. 123.

Notes.

return demanded pay for the overweight of the baggage, which the person refused to pay and demanded the return of his baggage, but on account of it being covered up by other baggage in the car where it had been placed the baggage-master refused to return it to him or give him his checks, and the baggage was carried on the train to the place to which the passenger intended to have it checked, but the owner did not go, and after its arrival it was burned, it was held that the railroad company did not sustain the relation of a common carrier towards the plaintiff and his trunks, the plaintiff having refused to occupy towards the defendant the position of passenger.¹ The Commissioners of Emigration in the city of New York are not by virtue of their duties common carriers of emigrants or their baggage arriving there.²

§ 2. **Duty of Common Carrier to receive and carry Passengers.** — A distinguishing feature of common carriers of passengers, as differing from private or special carriers of the same, is the duty generally to receive and transport all persons who apply for passage. They are regarded by law as if they were in the public service, and this duty is imposed from the public nature of their employment. There is an implied obligation on their part not to refuse to receive and carry persons who offer themselves as passengers. All persons, in a general sense, are equal before the law, and the common carrier owes this general duty to the whole public. This obligation is not based upon the express contract of carriage, although it may be modified and limited by it, but it is wholly independent of any contract.³ It is closely analogous to the duty of innkeepers to receive all guests who may apply for accommodations. And the same general principles of law apply in respect to this duty of common carriers of passengers as apply to the duty of innkeepers to receive all who come. Of course we speak only of the general duty of the common carrier. He is not bound to carry an improper person, or to carry a passenger to a place to which he does not hold himself out as a carrier. And the common carrier may make reasonable rules respecting the reception and carriage of passengers, which may sensibly abridge the general duty as above stated. He is not bound to carry all persons at all times; but he may not discriminate between persons whom he will carry, unless such discrimination is based upon a reasonable rule or for good cause.⁴

§ 3. **What will excuse Carrier from receiving and carrying Passenger.** — While it is the duty of the carrier to receive all proper persons who apply for transportation, so long as he has room, on their complying with all reasonable

¹ McCormick v. Pa. etc. R. Co., 49 N. Y. 303.

² Murphy v. Commissioners of Emigration, 28 N. Y. 134; Semler v. Commissioners of Emigration, 1 Hilt. 244.

³ Saltonstall v. Stockton, 1 Taney's Dec. 11, 19 (affirmed, *sub nom.* Stokes v. Saltonstall, 13 Pet. 181); Hannibal R. R. v. Swift, 12 Wall. 263, 270; Tarbell v. Central Pacific R. Co., 34 Cal. 616; Bretherton v. Wood, 3 Brod. & B. 54; Pleasants v. North Beach etc. R. Co., 34 Cal. 588; Turner v. North Beach etc. R. Co., 34 Cal. 594.

⁴ Indianapolis etc. R. Co. v. Rinard, 46 Ind.

293; Sanford v. Catawissa etc. R. Co., 2 Phila. 107; Day v. Owen, 5 Mich. 520; West Chester etc. R. Co. v. Miles, 55 Pa. St. 209; Bennett v. Dutton, 10 N. H. 481, *ante*, p. 2. If a railroad company holds itself out as a common carrier to a point beyond the termination of its road, then it is a common carrier for the whole distance; and if it professes to contract and does contract with persons generally to carry them the entire distance, it must treat all alike and contract with and carry all who apply. Wheeler v. San Francisco etc. R. Co., 31 Cal. 46.

 Want of Room—Non-payment of Fare.

rules of the carrier, he is not obliged to carry one whose ostensible purpose is to injure the carrier's business,¹ one fleeing from justice, one going upon a train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling, or committing any crime; nor is he bound to carry a person who on account of his drunken condition would be obnoxious to passengers, nor one affected with a contagious disease.² Nor is the carrier bound to carry passengers on Sunday.³

§ 4. **Want of Room will usually excuse.**—Generally speaking, the want of adequate accommodations to transport passengers will excuse the failure to receive them on the part of the carrier,—as, where there is an unexpected increase in the number of those applying for passage, or where the reception of more would incommode those who have already taken passage.⁴ And the mere purchase of a ticket for a railway journey does not impose an absolute duty upon the part of the company to transport the passenger at the time he was led to expect he might go.⁵ But it has been held that where a railroad company has issued a ticket stipulating to run trains in a certain manuer, within a certain time, it cannot excuse itself from transporting a purchaser of such a ticket at the time he applies for passage, within the terms of the ticket, or at a reasonable time thereafter, on the ground that there is no room for him on the train.⁶ And while the carrier is not bound to receive an unusual number of passengers, beyond the number he might reasonably be required to provide for, if he does receive them, without condition, or notice of his inability to provide for them, he assumes all the obligations usually incumbent on such carriers.⁷

§ 5. **Payment of Fare.**—This duty to receive and carry all who apply for passage presupposes that the carrier is to be paid for his services in transporting the persons who make application. Therefore a person who has been deprived of his rights by the violation of this public duty on the part of the carrier must show that he was ready and willing to pay the lawful fare at the time the carrier refused to receive him. It is not necessary that the passenger should make a strictly legal tender of his fare.⁸ But it has been held that where it becomes necessary to stop a railroad train in order to eject a passenger for not paying his fare, he cannot claim to be immediately readmitted to the train upon a tender of his fare. If one passenger might by his unjustifiable humor cause the cars to stop, another might do the same thing, and thus the utmost irregularity in the running of the train might be produced, jeopardizing the safety of the company's property and the lives of all on board. After having

¹ *Jencks v. Coleman*, 2 Sumn. 221, *ante*, p. 11; *The D. R. Martin*, 11 Blatchf. 233.

² *Thurston v. Union Pacific R. Co.*, 4 Dill. 321, *ante*, p. 10; *Pittsburgh etc. R. Co. v. Vandyne*, 57 Ind. 576; *Pittsburgh etc. R. Co. v. Pillow*, 76 Pa. St. 510. See also *Arnold v. Illinois etc. R. Co.*, 83 Ill. 273; *Vinton v. Middlesex R. Co.*, 11 Allen, 304, *ante*, p. 6.

³ *Walsh v. Chicago etc. R. Co.*, 42 Wis. 23.

⁴ *The Pacific*, 1 Blatchf. 569; *Jencks v. Coleman*, 2 Sumn. 221, *ante*, p. 11.

⁵ *Hurst v. Great Western R. Co.*, 19 C. B. (N. S.) 310; s. c. 11 Jur. (N. S.) 730.

⁶ *Hawcroft v. Great Northern R. Co.*, 8 Eng. Law & Eq. 362; s. c. 16 Jur. 196; *post*, p. 59.

⁷ *Evansville etc. R. Co. v. Duncan*, 23 Ind. 441.

⁸ *Tarbell v. Central Pacific R. Co.*, 34 Cal. 616; *Day v. Owen*, 5 Mich. 520; *Nashville etc. R. Co. v. Messino*, 1 Sneed, 220.

Notes.

forfeited his right to remain upon the train, it is for the company's agents to say whether he may be readmitted after having occasioned the inconvenience of a stoppage.¹

§ 6. **Ejecting Passengers who have been received.**—It may be stated as a proposition of law that the carrier may for good cause exclude a passenger. But if he does receive him knowing that a good cause exists for his exclusion, he cannot afterwards eject him for the same cause. The carrier cannot refuse to perform the contract of carriage, and plead in justification facts which he knew existed at the time the contract was made. But there are cases that go further than this. They seem to hold that when the passenger is received and the journey is begun the carrier must be held to have consented to the passenger's being carried to his destination, notwithstanding that a reason exists which would have been sufficient in law to justify the passenger's exclusion, but which was unknown to the carrier, at the time the passenger was received. Thus, in a case in the United States Supreme Court,² where a person whom the master would have been justified in refusing to receive as a passenger had he been aware at the time of certain facts in regard to him, got on board of a vessel, and after the vessel was at sea the master became aware of these facts, and transferred the person to another vessel, which returned him to the place where he embarked, it was held that, while he would have been justified in refusing to receive him in the first instance, it was too late after the ship had got to sea to take exceptions to the character of the passenger or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. Again, in a California case,³ where a person got on a train, and after the train had proceeded five miles on its way the conductor demanded his fare, which the person tendered in legal-tender currency, and the conductor ejected him because he would not pay his fare in coin, the then current money in that State, the court said: "Whether the defendant could have legally exacted payment in coin before the plaintiff was admitted into the cars and the journey commenced is a question not involved in this case, and upon which we express no opinion. Having received the plaintiff, and proceeded several miles upon the journey, the defendant must be held to have consented to receive in payment of the fare any good and lawful money which the plaintiff might tender when called upon for payment. *The kind of money had then ceased to be an open question, for the contract was already made and in process of performance.*" We allude to this subject farther on, but we here want to say that we do not regard these cases as stating sound law in so far as they hold that the contract of carriage is made simply by the passenger getting on board the conveyance and it beginning its trip. There must be a union of minds, a mutual assent, by the parties, to form a contract. If reasons exist unknown to the carrier which would have absolved him from the implied public duty of transporting the passenger, can it be said that the passenger may by concealing the facts until the carriage is begun invest the carrier with this duty, thus profiting by his own wrong?

¹ *Nelson v. Long Island R. Co.*, 7 Hun, 140; *The People v. Jillson*, 3 Park. Cr. 234; *Hibbard v. New York etc. R. Co.*, 15 N. Y. 455; *O'Brien v. Boston etc. R. Co.*, 15 Gray, 20, *ante*, p. 22.

² *Pearson v. Duane*, 4 Wall. 605, *ante*, p. 17.

³ *Tarbell v. Central Pacific R. Co.*, 34 Cal. 616, 623.

CHAPTER II.

WHEN THE RELATION OF CARRIER AND PASSENGER SUBSISTS.

- LEADING CASES: 1. *Philadelphia and Reading Railroad Company v. Derby*.—
Injury to passenger who rides free—*Respondeat superior*—Servant acting against orders.
2. *Nolton v. Western Railroad Corporation*.—Injury to mail
agent upon railway train.

- NOTES: § 1. The relation of carrier and passenger arises how.
2. Consummation of the contract not necessary.
3. Persons riding gratuitously.
4. What constitutes gratuitous carriage.
5. Persons carrying on business on the carrier's vehicles or
vessels.
6. Employees of the carrier.
7. Persons attending passengers arriving or departing.
8. Passengers temporarily absent from conveyance, etc.
9. Evidence as to who is a passenger—Burden of proof—
Employee's pass—Evidence to show that the train is
a passenger train.
10. Persons employed on private car—Slaves carried for hire.

1. INJURY TO PASSENGER WHO RIDES FREE—RESPONDEAT SUPERIOR—SERVANT ACTING AGAINST ORDERS.

PHILADELPHIA AND READING RAILROAD COMPANY *v.* DERBY.*

Supreme Court of the United States, 1852.

Hon. ROGER B. TANEY, *Chief Justice.*

" JOHN McLEAN,	} Associate Justices.
" JAMES M. WAYNE,	
" JOHN CATRON,	
" PETER V. DANIEL,	
" SAMUEL NELSON,	
" ROBERT C. GRIER,	
" BENJAMIN R. CURTIS,	

1. **Injury to Passenger who rides free.**—To an action by a person for an injury received by him while travelling upon a railway train, by reason of the negligence of the ser-

* Reported, 14 How. 468.

Philadelphia and Reading Railroad Company v. Derby.

vants of the railway company, it is no defence that he was not a passenger for hire but that he was travelling gratuitously by invitation of the president of the defendant company, he himself being a shareholder therein; the governing principle being that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.

2. **Respondent Superior.**—Nor is it a defence that the negligent act of the servant of the defendant which caused the injury was done contrary to express orders received from his superiors.

St. George T. Campbell and Fisher, for the plaintiffs; Wharton and Binney, contra.

Mr. Justice GRIER stated the case and delivered the opinion of the court.—This action was brought by Derby, the plaintiff below, to recover damages for an injury suffered on the railroad of the plaintiffs in error. The peculiar facts of the case, involving the questions of law presented for our consideration, are these:—

The plaintiff below was himself the president of another railroad company, and a stockholder in this. He was on the road of defendants by invitation of the president of the company, not in the usual passenger-cars, but in a small locomotive-car used for the convenience of the officers of the company, and paid no fare for his transportation. The injury to his person was caused by coming into collision with a locomotive and tender, in the charge of an agent or servant of the company, which was on the same track and moving in an opposite direction. Another agent of the company, in the exercise of proper care and caution, had given orders to keep this track clear. The driver of the colliding engine acted in disobedience and disregard of these orders, and thus caused the collision.

The instructions given by the court below at the instance of the plaintiff, as well as those requested by the defendants and refused by the court, taken together, involve but two distinct points, which have been the subject of exception here, and are in substance as follows:—

1. The court instructed the jury that if the plaintiff was lawfully on the road at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he is entitled to recover, notwithstanding the circumstances given in evidence, and relied upon by defendants' counsel as forming a defence to the action, to wit: that the plaintiff was a stockholder in the company, riding by invitation of the president, paying no fare, and not in the usual passenger-cars, etc.

2. That the fact that the engineer having the control of the colliding locomotive was forbidden to run on that track at the time, and had

 Supreme Court of the United States.

acted in disobedience of such orders, was not a defence to the action.

1. In support of the objections to the first instruction, it is alleged "that no cause of action can arise to any person by reason of the occurrence of an unintentional injury, while he is receiving or partaking of any of those acts of kindness which spring from mere social relations; and that as there was no contract between the parties, express or implied, the law would raise no duty as between them, for the neglect of which an action can be sustained."

In support of these positions, the cases between innkeeper and guest have been cited, such as 1 *Rolle's Abridgment*, 3, where it is said, "If a host invite one to supper, and the night being far spent he invites him to stay all night, and the guest be robbed, yet the host shall not be chargeable, because the guest was not a traveller;" and *Calye's Case*,¹ to the same effect, showing that the peculiar liability of an innkeeper arises from the consideration paid for his entertainment of travellers, and does not exist in the case of gratuitous lodging of friends or guests. The case of *Farwell v. Boston and Worcester Railroad Company*² has also been cited, showing that the master is not liable for any injury received by one of his servants in consequence of the carelessness of another while both are engaged in the same service.

But we are of opinion that these cases have no application to the present. The liability of the defendants below for the negligent and injurious act of their servant is not necessarily founded on any contract or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other. It is true, a traveller by stage-coach or other public conveyance who is injured by the negligence of the driver has an action against the owner, founded on his contract to carry him safely. But the maxim of *respondeat superior*, which by legal imputation makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master. If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him and injures his property or person, it is no answer to an action against the master for such injury either that the plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff.

¹ 8 Coke, 63.

² 4 Metc. 49.

Philadelphia and Reading Railroad Company *v.* Derby.

These arguments, arising from the social or domestic relations of life, may in some cases successfully appeal to the feelings of the plaintiff, but will usually have little effect where the defendant is a corporation, which is itself incapable of such relations or the reciprocation of such feelings.

In this view of the case, if the plaintiff was lawfully on the road at the time of the collision, the court were right in instructing the jury that none of the antecedent circumstances, or accidents of his situation, could affect his right to recover.

It is a fact peculiar to this case that the defendants, who are liable for the act of their servant coming down the road, are also the carriers who were conveying the plaintiff up the road, and that their servants immediately engaged in transporting the plaintiff were not guilty of any negligence, or in fault for the collision. But we would not have it inferred from what has been said that the circumstances alleged in the first point would affect the case if the negligence which caused the injury had been committed by the agents of the company who were in the immediate care of the engine and car in which the plaintiff rode, and he was compelled to rely on these counts of his declaration founded on the duty of the defendant to carry him safely. This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. "The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it."¹ It is true, a distinction has been taken, in some cases, between simple negligence and great or gross negligence; and it is said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence.

When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of "gross."

In this view of the case, also, we think there was no error in the first instruction.

2. The second instruction involves the question of the liability of the

¹ See *Coggs v. Bernard*, and cases cited in 1 Smith's *Ld. Cas.* 95.

Supreme Court of the United States.

master where the servant is in the course of his employment, but in the matter complained of has acted contrary to the express command of his master.

The rule of *respondeat superior*, or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable if the act be done in the course of his servant's employment.¹

There may be found, in some of the numerous cases reported on this subject, *dicta* which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the act of his servant was in disobedience of his orders. But a more careful examination will show that they depended on the question whether the servant, at the time he did the act complained of, was acting in the course of his employment; or in other words, whether he was or was not at the time in the relation of servant to the defendant.

The case of *Sleath v. Wilson*² states the law in such cases distinctly and correctly. In that case, a servant having his master's carriage and horses in his possession and control was directed to take them to a certain place; but instead of doing so he went in another direction to deliver a parcel of his own, and, returning, drove against an old woman and injured her. Here the master was held liable for the act of the servant, though at the time he committed the offence he was acting in disregard of his master's orders; because the master had intrusted the carriage to his control and care, and in driving it he was acting in the course of his employment. Mr. Justice ERSKINE remarks in this case: "It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable; and on this ground, that the master has not intrusted the servant with the carriage; but whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders and drives fast, and through his negligence occasions an injury, the

¹ See Story on Ag., § 452; Smith on Master and Servant, 152.

² 9 Car. & P. 607.

Philadelphia and Reading Railroad Company v. Derby.

master will not be liable. But that is not the law; the master, in such a case, will be liable, and the ground is that he has put it in the servant's power to mismanage the carriage, by intrusting him with it."

Although among the numerous cases on this subject some may be found, such as the case of *Lamb v. Palk*,¹ in which the court have made some distinctions which are rather subtle and astute, as to when the servant may be said to be acting in the employ of his master, yet we find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim of *respondet superior* would, in a measure, nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is itself an act of negligence, the *causa causans* of the mischief; while the proximate cause, or the *ipsa negligentia*, which produces it may truly be said in most cases to be the disobedience of orders by the servant so intrusted. If such disobedience could be set up by a railroad company as a defence when charged with negligence, the remedy of the injured party would in most cases be illusive; discipline would be relaxed, and the danger to the life and limb of the traveller greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety.

The judgment of the Circuit Court is therefore affirmed.

DANIEL, J., dissents from the decision of this court in this cause, upon the ground that the said railroad company, being a corporation created by the State of Pennsylvania, is not capable of pleading or being impleaded, under the second section of the third article of the Constitution, in any courts of the United States, and that therefore the Circuit Court could not take cognizance of the controversy between that corporation and the plaintiff in that court.²

Judgment affirmed.

¹ 9 Car. & P. 629.

² It is scarcely necessary to suggest to any practitioner that the Federal jurisdiction is thoroughly established against the view of Mr. Justice Daniel. — ED.

New York Court of Appeals.

2. MAIL AGENTS UPON RAILWAY TRAINS.

NOLTON *v.* WESTERN RAILROAD CORPORATION.**New York Court of Appeals, 1857.*Hon. HIRAM DENIO, *Chief Judge.*

" ALEXANDER S. JOHNSON,	} <i>Judges.</i>
" GEORGE T. COMSTOCK,	
" SAMUEL L. SELDEN,	
" JOHN W. BROWN,	} <i>Judges of the Supreme Court,</i>
" ALONZO C. PAGE,	
" WILLIAM H. SHANKLAND,	
" LEVI F. BOWEN,	

and ex-officio Judges of the Court of Appeals.

1. **Obligation of Carrier towards Mail Agents.**—Where a railway company transports a mail agent upon its trains in pursuance of a contract made between the company and the government, the relation of carrier and passenger does not, in a strict sense, subsist between the company and the mail agent. The carrier is not under the high degree of care toward the mail agent which springs out of a contract of carriage, but is under a duty imposed by law to transport him safely, which duty is violated when the mail agent is injured through the gross negligence of the carrier or his servant. Gross negligence is here, however, a relative term, depending upon the circumstances of each particular case.
2. **The Principle governing such Cases.**—In all cases where the carrier undertakes the conveyance of a passenger, whether with or without compensation, in the absence of an express agreement exempting him from responsibility, if the passenger is injured through the culpable negligence or want of skill of the carrier's agents the carrier must pay damages to the passenger.

DEMURRER to complaint: The complaint stated that the plaintiff was a mail agent on the defendant's railroad, in the employment of the United States, and the defendant a carrier of passengers and freight, for fare and reward, by railroad and cars. between Greenbush and Boston; that defendant was bound by contract between it and the United States, for a stipulated time and price, to carry the mails, and also the mail agent, without further charge; that in pursuance and in consideration of such contract, the defendant received the plaintiff into a car fitted up for the accommodation of the mail and mail agent; and the plaintiff, for the consideration aforesaid, became and was a passenger in the said cars, to be by the defendant thereby safely and with due care and skill carried and conveyed to Worcester, which the defendant then and there undertook and was bound to do. It then states a bodily injury received by the plaintiff by the running of the car containing

* Reported, 15 N. Y. 444.

Nolton v. Western Railroad Corporation.

the plaintiff off the track, and breaking it, through defectiveness of machinery, want of care, skill, etc. The defendant demurred, and after final judgment for the plaintiff by the Supreme Court at General Term, appealed to this court. The case was submitted on printed briefs.

N. Hill, for the appellant; *W. A. Beach*, for the respondent.

SELDEN, J. — As the only objection which can be taken to the complaint upon this demurrer is that it does not contain facts sufficient to constitute a cause of action, it is entirely immaterial whether the action be considered as in form *ex contractu* or *ex delicto*. The only question is, whether, upon the facts stated, the plaintiff can maintain an action in any form. The plaintiff cannot, I think, avail himself of the contract between the defendant and the government, so as to make that the *gravamen* of his complaint and the foundation of a recovery. This is not like the cases in which a third person has been permitted to recover upon a contract made by another party for his own benefit. The distinction between them is plain. Those were cases where the defendant, for a consideration received from the party to the contract, had undertaken to do something ostensibly and avowedly for the direct benefit of the plaintiff, and when the advantage to the latter was one object of the agreement. Here the parties had no such intention. In contracting for the transportation of the mail agent, the parties had no more in view any benefit or advantage to him than if the contract had been to transport a chattel. The government took care of the public interests, and left those of the mail agent to such protection as the law would afford.

Another distinction is, that in the cases referred to, the party claiming the benefit of the contract and seeking to enforce it was one who was specifically mentioned and pointed out in the contract itself, while here no one is designated; and to entitle the plaintiff to recover upon it, it must be regarded as a shifting contract, which can be made to enure to the benefit of any person who may temporarily assume the duties of mail agent. I think there is no precedent for such a construction of such a contract.

If, then, the plaintiff can recover at all, it must be upon the ground of some implied contract, or of some legal obligation or duty resting upon the defendant to exercise proper care and skill in the transportation of passengers; and the question is, whether, under the circumstances of this case, such a contract is implied, or such a duty imposed for the benefit of the plaintiff.

It would seem a startling proposition that in all those cases where

New York Court of Appeals.

persons travel upon railroads, engaged not in their own business, but that of others, and where their fare is paid by their employer, they are entirely at the mercy of the railroad agents, and without redress if injured through their recklessness and want of care and skill. If, however, railroad companies are liable in cases like the present, it is important to ascertain the precise nature and extent of that liability.

In the first place, then, it is clear that they are not liable by virtue of that custom or rule of the common law which imposes special and peculiar obligations upon common carriers.

Persons engaged in the conveyance of passengers are not common carriers, within the meaning of that rule, which applies solely to those whose business it is to transport goods.¹

If the complaint in this case, after stating that the defendant was a carrier of passengers and freight from Greenbush to Boston for hire and reward, had simply averred that the plaintiff became a passenger in the cars of the defendant, and was so received by it, an implied contract would have arisen on the part of the defendant to transport the plaintiff with all due diligence and skill; because the law would have inferred from those facts that the defendant was to receive a compensation from the plaintiff himself. But this inference is repelled by the contract set forth, and the statement that the plaintiff was received as a passenger under it.

It was suggested by the plaintiff's counsel, upon the argument, that a contract might be implied, of which the agreement between the defendant and the government should form the consideration and basis. But although that agreement may be resorted to for the purpose of showing that the plaintiff became a passenger upon the cars by the consent of the defendant, and not as a mere intruder, it cannot, I think, be made available by the plaintiff as the consideration of an implied *assumpsit*. As to him, that agreement is *res inter alios acta*. He is not a party to it, or mentioned in it. His employment by the government may have taken place long after the agreement was made, and have had no reference to it. If any contract can be implied from that agreement, in favor of the plaintiff, it must be a contract to transport him from place to place according to the terms of the agreement. Suppose, then, the cause of action, instead of being for an injury received through the negligence of the defendant, had been for not furnishing the necessary cars, or not running any train, could the plaintiff recover in such an action? Would the defendant be liable for its failure to perform the

¹ Bac. Abr., tit. "Carriers;" 2 Kent's Comm., § 40; Story on Bail., § 498, and note.

Nolton v. Western Railroad Corporation.

contract, not only to the party with whom the contract was made and from whom the consideration was received, but to a third party, not named in it, and from whom they had received nothing? No one would claim this.

It may be said that the implied contract with the plaintiff is limited to an undertaking to transport safely, or with due care. It is difficult to see, however, how there can be a contract to transport safely where there is no contract to transport at all. My conclusion, therefore, is that this action cannot be maintained upon the basis of a contract, express or implied. It necessarily follows that it must rest exclusively upon that obligation which the law always imposes upon every one who attempts to do any thing, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken. The leading case on this subject is that of *Coggs v. Bernard*.¹ There the defendant had undertaken to take several hogsheads of brandy belonging to the plaintiff from one cellar in London, and to deposit them in another; and in the process of moving, one of the hogsheads was staved and the brandy lost, through the carelessness of the defendant or his servants. Although it did not appear that the defendant was to receive any thing for his services, he was nevertheless held liable by the whole court.

The principle of this case has never since been doubted, but there has been some confusion in the subsequent cases as to the true nature of the obligation, and as to the form of the remedy for its violation. In many instances suits have been brought upon the supposition that an implied contract arises in all such cases that the party will exercise due care and diligence; and the language of Lord Holt in *Coggs v. Bernard*¹ undoubtedly gives countenance to this idea. He seems to treat the trust and confidence reposed as a sufficient consideration to support a promise. This doctrine, however, can hardly be considered as in consonance with the general principles of the common law. In addition to the difficulty of bringing mere trust and confidence within any legal definition of valuable consideration, there is a manifest incongruity in raising a contract to do with care and skill that which the party is under no legal obligation to do at all.

The duty arises in such cases, I apprehend, entirely independent of any contract, either expressed or implied. The principle upon which a party is held responsible for its violation does not differ very essentially in its nature from that which imposes a liability upon the owner of a dan-

¹ Ld. Raym. 909.

New York Court of Appeals.

gerous animal who carelessly suffers such animal to run at large, by means of which another sustains injury; or upon one who digs a ditch for some lawful purpose in a highway, and carelessly leaves it uncovered at night, to the injury of some traveller upon the road. It is true it may be said that in these cases the duty is to the public, while in the present case, if it exists at all, it is to the individual. But the basis of the liability is the same in both cases, viz., the culpable negligence of the party. All actions for negligence presuppose some obligation or duty violated. Mere negligence where there was no legal obligation to use care, as where a man digs a pit upon his own land and carelessly leaves it open, affords no ground of action. But where there is any thing in the circumstances to create a duty, either to an individual or the public, any neglect to perform that duty, from which injury arises, is actionable.

The present case falls clearly within this principle of liability. There can be no material difference between a gratuitous undertaking to transport property, and a similar undertaking to transport a person. If either is injured through the culpable carelessness of the carrier, he is liable. If, according to the case of *Coggs v. Bernard* (*supra*) and the subsequent cases, an obligation to exercise care arises in one case, it must also in the other.

It is true that according to the authorities the party, in such cases, is only liable for gross negligence. But what will amount to gross negligence depends upon the special circumstances of each case. It has been held that when the condition of the party charged is such as to imply peculiar knowledge and skill, the omission to exercise such skill is equivalent to gross negligence. Thus, it was said by Lord LOUGHBOROUGH, in *Shiells v. Blackburne*,¹ that "if a man gratuitously undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence." The same doctrine is advanced by PARKE, B., in *Wilson v. Brett*.² He says: "In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it."

I regard this principle as peculiarly applicable to railroad companies, in view of the magnitude of the interests which depend upon the skill of their agents, and of the utter powerlessness of those who trust to that skill to provide for their own security.

This case is not like that of *Winterbottom v. Wright*.³ There the

¹ 1 H. Black. 153.² 11 Mee. & W. 113.³ 10 Mee. & W. 109.

Notes.

defendant had not undertaken to transport the plaintiff, either gratuitously or otherwise. He was simply bound by contract with the government to furnish and keep in repair the carriages used by the latter in transporting the mails. The relations of the parties in that case and in this are very different, and the cases cannot be considered as governed by the same principles. I entertain no doubt that in all cases where a railroad company voluntarily undertakes to convey a passenger upon its road, whether with or without compensation, in the absence, at least, of an express agreement exempting it from responsibility, if such passenger is injured by the culpable negligence or want of skill of the agents of the company the latter is liable. The matter of compensation may have a bearing upon the degree of negligence for which the company is liable. That question, however, does not arise here. Degrees of negligence are matters of proof, and not of averment. The allegations of negligence in this complaint are sufficient, whether the defendant is liable for ordinary or only for gross negligence.

The judgment should be affirmed.

BROWN, J., also delivered an opinion for affirmance. All the judges concurring,

Judgment affirmed.

NOTES.

§ 1. *The Relation of Carrier and Passenger arises how.*—Though the relation of carrier and passenger, strictly speaking, arises only from the contract of carriage, still, to render the carrier responsible for negligence, such contract need not be express, nor actually consummated. Very slight circumstances will suffice to sustain an implication of it. Where it appeared that the plaintiff held up his finger to the driver of an omnibus, who stopped to take him up, and that, just as the plaintiff was putting his foot on the step of the omnibus, the driver drove on, and the plaintiff fell on his face to the ground, the court held that this was evidence to go to the jury in support of the declaration, which set up a contract for carriage, as the stopping of the omnibus implied a consent to take the plaintiff up as a passenger.¹ In another case, which was an action for the loss of baggage, the plaintiff's possession of a baggage-check, and the testimony of the baggage-master that when required by passengers he put checks on their baggage and gave duplicates to the passengers, were held to be sufficient evidence that the plaintiff was a passenger on the cars, and that he had baggage checked on that occasion.²

¹ *Brien v. Bennett*, 8 Car. & P. 724.

² *Davis v. Cayuga etc. R. Co.*, 10 How. Pr. 330.

Gratuitous Carriage.

§ 2. Consummation of the Contract not necessary. — It is not necessary to the existence of the relation of carrier and passenger that the contract should be actually consummated, either by the payment of fare, or entry into the cars or vessel of the carrier. Going into the depot or waiting-room of the defendant and waiting for the means of conveyance with a *bonâ fide* intention of becoming a passenger is sufficient to cast upon the defendant the duty of treating the plaintiff as a passenger.¹ In an Iowa case, the plaintiff entered the office or waiting-room provided by the defendant for passengers, and informed the depot or ticket agent of her desire to become a passenger. She, in good faith, placed herself under his direction, and he directed her as to the manner in which she was to get on a caboose-car on which she was to take passage. This was held sufficient to justify the jury in finding that the relation of passenger and carrier existed.² Where one goes upon a passenger steamboat, in good faith, to take passage thereon, he is there in the character and relation of a passenger, and the owner of the boat owes to him the duty of a carrier of passengers, although no fare has been paid.³ The whole matter seems to depend upon the intention of the person at the time he enters the boat, or cars, or waiting-room of the defendant. In Illinois it has been held that where a steamboat lands at one of its usual stopping-places for the purpose of taking on freight and passengers, it is not a presumption of law that every person who goes on board does so as a passenger unless he notifies an officer of the boat to the contrary, so as to relieve the officers from the duty of giving such as do not come aboard as passengers proper time and facilities for getting ashore.⁴ But though the relation depends to a great extent upon the intention of the person seeking to become a passenger, yet if, after having violated the regulations of the company by refusing to pay his fare, or by conducting himself improperly, he has been rightly ejected therefor from the cars, he cannot by climbing again into the cars and offering to pay his fare restore the relation of carrier and passenger. He has violated the contract for carriage, on his part, and he has no right to insist that it shall be performed on the part of the carrier.⁵

§ 3. Persons riding gratuitously. — The relation of carrier and passenger certainly does not exist between a railroad company and one who secretes himself on their train with a view of fraudulently obtaining a free ride, nor between the owners of a vessel and a "stowaway." This doctrine extends further, and includes the case of one who knowingly induces the conductor of a train to violate the regulations of the company and disregard his obligations of fidelity to his employer. Therefore, where a man and his wife persuaded the conductor to permit them to ride free, knowing that it was contrary to the rules of the company, and he was killed in a collision, the court held, in an action by the wife for damages, that the company did not owe him the duty of a carrier to a

¹ Gordon v. Grand Street etc. R. Co., 40 Barb. 546.

² Allender v. Chicago etc. R. Co., 37 Iowa, 264.

³ Cleveland v. New Jersey Steamboat Co., 68 N. Y. 306. See also Hurt v. Southern R. Co., 40 Miss. 391.

⁴ Keokuk Packet Co. v. Henry, 50 Ill. 264.

⁵ O'Brien v. Boston etc. R. Co., 15 Gray, 20, ante, p. 22; Nelson v. Long Island R. Co., 7 Hun, 140; The People v. Jillson, 3 Park. Cr. Cas. 234; Hibbard v. New York etc. R. Co., 15 N. Y. 455.

Notes.

passenger.¹ In a case in which it appeared that a cattle-shipper fraudulently obtained a "drover's pass" for his wife from the agent of a railroad company by representing that she was the owner of a part of the stock, whereas the fact was that she was neither an owner nor had charge of any part of the stock; and further, that when the pass was presented the conductor refused to honor it, and, upon her declining to pay the fare, handed her, without violence or incivility, from the train, whereupon the fare was paid and plaintiffs reentered the train and proceeded upon their journey; the court held that the relation of carrier and passenger did not exist as to the wife.² So held, too, in the case of a person travelling upon a pass issued to another person which was not transferable, and passing himself for the person therein named.³ But the simple fact that an agent of the carrier violates his duty and invites a person to ride free, without a collusion on his part with the agent to defraud the carrier, will not operate so as to deprive him of his remedy as a passenger, if he is injured through the carelessness of the carrier's agents.⁴ In an English case it appeared that the defendant, a railroad corporation, was required by its charter regulations to run certain trains upon which children under three years of age were permitted to ride free and half-fare was charged for children between three and twelve years of age. The plaintiff was three years and three months of age, and was riding upon the train in charge of his mother (who took a ticket for herself alone), and was injured through the negligence of the defendants. The defence was that he was not a passenger; but the court held otherwise.⁵ The carrier does not, by consenting to carry a person gratuitously, relieve himself of the responsibility which the law imposes upon him with reference to passengers generally. Where the assent to his riding free has been legally and properly given, he is entitled to the same degree of care as if he paid his fare.⁶ Thus, a guest of the president of a railroad company, riding by his invitation in a special car, was injured in a collision. The court held that the fact that he paid nothing for his passage had no effect upon the duty which the company owed him as a passenger.⁷ Where a person was carried free upon the defendant's vessel in consideration of the fact that he was a "steamboat-man," it being the custom to carry such persons free, the court held, in an action for personal injuries by the negligence of the defendant's agents, that the circumstance of free carriage did not deprive him of the right of redress enjoyed by other passengers.⁸ Nor, after it has once had its inception, will the relation of carrier and passenger be affected by the circumstance that the agent of the carrier, in consideration of the fact that the passenger has been injured, returns the money paid for passage.⁹

¹ Toledo etc. R. Co. v. Brooks, 81 Ill. 245. See also Chicago etc. R. Co. v. Michie, 83 Ill. 427.

² Brown v. Missouri etc. R. Co., 64 Mo. 536.

³ Toledo etc. R. Co. v. Beggs, 85 Ill. 80. But see Great Northern R. Co. v. Harrison, 23 L. J. (Exch.) 308; s. c. 12 C. B. 576; 26 Eng. Law & Eq. 443.

⁴ Wilton v. Middlesex R. Co., 107 Mass. 103; s. c. 125 Mass. 130; Pittsburgh etc. R. Co. v. Caldwell, 74 Pa. St. 421; Washburn v. Nashville etc. R. Co., 3 Head, 638.

⁵ Austin v. Great Western R. Co., 8 Best

& S. 327; s. c. L. R. 2 Q. B. 442; 36 L. J. (Q. B.) 201; 15 Week. Rep. 863; 16 L. T. (N. S.) 320.

⁶ Todd v. Old Colony R. Co., 3 Allen, 18; s. c. 7 Allen, 207; Rose v. Des Moines Valley R. Co., 39 Iowa, 246; Jacobus v. St. Paul etc. R. Co., 20 Minn. 125; s. c. 1 Cent. L. J. 375. *Contra*, Kinney v. Central R. Co., 34 N. J. L. 513.

⁷ Phila. etc. R. Co. v. Derby, 14 How. 468, ante, p. 31.

⁸ Str. New World v. King, 16 How. 469.

⁹ Packet Co. v. Clough, 20 Wall. 528.

 Person carrying on Business on Carrier's Vehicle.

§ 4. **What constitutes Gratuitous Carriage.**—It is not necessary that a passenger's fare should be paid in money to constitute him a passenger for hire. If the company receives any benefit or advantage in connection with his passage, it is sufficient.¹ Thus, where a person was negotiating with a railroad company respecting the introduction and use upon their trains of a patent car-coupling, and went at the request and expense of the company to a point on its road to see one of its officers in relation to the matter, and a pass was furnished by the company, it was held, in an action for an injury received during the transportation, that he was a passenger for hire.² Nor is a person who accepts a drover's pass, given to him in consideration of the shipment of cattle, in order that he may accompany them to their destination, a gratuitous passenger.³

§ 5. **Persons carrying on Business on the Carrier's Vehicles or Vessels.**—Persons who are permitted by carriers to travel upon their trains or boats for the purpose of carrying on a lawful business, either for themselves or for another, are very much in the same position as persons permitted to ride free. They pay nothing for their passage, yet they are entitled to recover damages for a negligent injury, the same as passengers carried for hire. Thus, a mail agent for whose carriage together with the mail, in a car specially fitted up for that purpose, the government had contracted with the defendant, a railroad company, and who himself paid nothing for his carriage, was held to be a passenger in so far that the carrier was liable in damages for a negligent injury. An action by such a person for personal injuries through negligence is maintainable, not upon any theory of subrogation to the contract with the government, but in view of the duty which the law imposes upon the carrier.⁴ Such, too, is the position of an express messenger sent along in charge of the matter of an express company who have contracted with the carrier for the carriage of such matter and their agent in charge of it.⁵ This rule has been extended to include a person temporarily supplying the place of the express messenger.⁶ "There is no provision in the contract," said MILLER, J., of the New York Court of Appeals, "which prevents the employment by the express company of any person as a messenger, or in the place of such messenger when for any reason he is prevented from attending to his duties. The intestate, therefore, was lawfully upon the cars, and entitled to the same protection as the messenger whose place he filled."⁷ But where an express messenger brings a stranger into an express-car for the purpose of teaching him the duties of the route, in order that he may supply his place during his absence, and introduces him to the conductor as a

¹ *Railway Co. v. Stevens*, 95 U. S. 655; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Smith v. New York etc. R. Co.*, 24 N. Y. 222; *Cleveland etc. R. Co. v. Curran*, 19 Ohio St. 1.

² *Railway Co. v. Stevens*, 95 U. S. 655.

³ *Railroad Co. v. Lockwood*, 17 Wall. 357; *Smith v. New York etc. R. Co.*, 24 N. Y. 222; s. c. 29 Barb. 132; *Cleveland etc. R. Co. v. Curran*, 19 Ohio St. 1; *Ohio etc. R. Co. v. Selby*, 47 Ind. 471; *Flinn v. Phila. etc. R. Co.*, 1 *Houst.* 469; *Graham v. Pacific R. Co.*, 66

Mo. 536; *Indianapolis etc. R. Co. v. Beaver*, 41 Ind. 493; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315.

⁴ *Nolton v. Western R. Corp.*, 15 N. Y. 444, *ante*, p. 37; *Collett v. London etc. R. Co.*, 15 Jur. 1053; s. c. 20 L. J. (Q. B.) 411; 16 Q. B. 984; *Hammond v. North-Eastern R. Co.*, 6 So. Car. 130.

⁵ *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

⁶ *Blair v. Erie R. Co.*, 66 N. Y. 313.

⁷ *Id.* 318.

Notes.

messenger learning the run, who thereupon demands no fare of him, when in fact such person is not an employee of the express company, and is not present in the car devoted to their use by any authority of theirs, the person so introduced by the express messenger into the car is not a passenger, but a trespasser, and cannot demand the degree of care for his safety which the law requires the railroad company to exercise toward its passengers.¹ A person leasing the bar upon a steamboat, for the purpose of selling liquors, cigars, etc., and paying for the privilege a certain sum per month, is a passenger, notwithstanding he does not pay any thing specifically as passage-money.² So, where a railroad company, in consideration of the payment to them by a person of a certain sum of money per year in quarterly instalments, and of his agreement to supply the passengers on one of their trains with iced water, issued season-tickets to him quarterly for his passage on any of their regular trains, and permitted him to sell popped corn on all their trains, it was held that his relation to them while travelling on their road under this contract was that of a passenger and not that of a servant.³ But a boy selling newspapers on the street, and accustomed to board street cars, with the acquiescence of the servants of the company, for the purpose of supplying the passengers with papers, is not a passenger, and the company is not charged with the duty of looking after his safety, or of seeing that he does not run into danger, or of stopping or slackening the speed of the car for him to leave it, whether requested so to do or not.⁴

§ 6. *Employees of the Carrier.*—Under what circumstances an employee travelling on his employer's conveyance will stand in the relation of passenger towards him is a question upon which there seems to be a want of unanimity among the authorities. It would be useless to attempt to reconcile the decisions on the subject. We can but notice them, leaving it to the reader to decide which are most in harmony with the general doctrine of master and servant, of which this subject is but a branch. The rules which give point to the distinction are these: If the *status* of the person is that of a passenger, the carrier is answerable to him for any injury happening through very slight negligence, or a want of the very highest degree of care;⁵ whereas if his *status* is that of servant, the carrier owes to him but ordinary care.⁶ Again, if he is a passenger, the carrier is answerable to him for injuries done to him by the servants of the latter, in conformity with the rule of *respondeat superior*.⁷ But if he is a servant of the carrier, this rule does not apply so as to make the latter responsible for injuries done to him by other servants of the carrier, engaged in the same common employment with him, and of such a grade as to be denominated "fellow-servants" of his.⁸

In a case in Pennsylvania, the plaintiff was a common laborer employed with other hands in digging and in filling certain gravel-cars which were used by the defendants in transporting gravel along their railroad for the purpose of repairing it. The hands boarded at a place about four miles distant from their principal

¹ Union Pacific R. Co. v. Nichols, 8 Kan. 505; s. c. 4 Ch. Leg. N. 82.

² Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71.

³ The Commonwealth v. Vermont etc. R. Co., 108 Mass. 7.

⁴ Fleming v. Brooklyn City R. Co., 1 Abb. N. C. 433.

⁵ Post, Chap. V.

⁶ 2 Thomp. on Neg., p. 972.

⁷ Id., p. 861.

⁸ Id., p. 969.

Carrier's Employees.

work, and it was usual for them to ride to and from their work in the gravel-cars. While he and others were going to their work, the accident complained of happened by the dumping of one of the cars and throwing the plaintiff out on the road. It was the understanding that the hands were to ride on the gravel-train to and from their work and at their work. He neither paid his fare nor gave any thing out of his wages for his passage to and fro. It was held that he was simply a servant, with the privilege of riding, as part of his business, in the gravel-train, which was one of the instruments of his work, and that he was no more a passenger than is a coachman or carter when in the employment of his master.¹

In another case, where the accident occurred by reason of a collision with a hand-car by the gravel-train upon which the plaintiff was riding, the relations of the plaintiff and defendants were almost identical with those of the parties to the case just stated. The plaintiff was a common laborer, employed in repairing the defendants' road-bed at a place several miles from his residence. Each morning and evening he rode with other laborers to and from the place of labor, on the gravel-train of the defendants. This was done with the consent of the company and for mutual convenience, no compensation being paid directly or indirectly by the laborers for the passage, and the company being under no contract to convey the laborers to and from their work. It was urged that the plaintiff was not in the employment of the defendants at the time the injury was received, and that he might properly be considered as a passenger, and that the defendants, as respecting him, were carriers for hire. But the court said: "It seems to us, in no view of the case can this action be maintained. If the plaintiff was, by the contract of service, to be carried by the defendants to the place for his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If it be not properly inferable from the evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself to facilitate his labors and service, and is equally connected with it and the relation of master and servant, and therefore furnishes no ground for maintaining this action." The court then likened the case to that of a wood-chopper riding for his own convenience upon his employer's wagon, driven by another servant, who overturns it by his negligence.²

In a case similar to the two just cited, which we will for identification call "gravel-train cases," it was argued by the plaintiff's counsel that, by the arrangement between the plaintiff and the defendant, the plaintiff was to be taken home by the defendant on the gravel-train at night; that his day's work was completed when the last load of gravel was deposited, and that he was under no further obligation to do any thing for the company; that carrying him home was a service to be performed by the company in consideration of the labor previously done, and constituted a part of his wages; that it was entirely optional with him to avail himself of this service or not; that while upon the train when the

¹ Ryan v. Cumberland Valley R. Co., 23 Pa. St. 384.

² Gillshannon v. Stony Brook R. Co., 10 Cush. 228, 231.

Notes.

accident occurred, which was during the trip home after the day's work was done, he was a passenger. The court thought that it was not entirely clear that, under the agreement with the plaintiff, the defendants might not insist upon his returning with the train at night, but said that, even conceding this, it did not follow "that while actually returning to the city with the train he was not the servant of the company. If he was a mere passenger, he was not bound to do any thing to facilitate the return of the train. If an emergency arose requiring the use of the brakes, he might refuse to raise his hand. If an obstruction was met with upon the track, he might fold his arms until the company removed it; and what he might do in this respect, every other hand returning to the city under similar circumstances might also do. Such could not, I think, have been the true relation between the parties. The plaintiff was employed by the defendants as a day-laborer. He was to be taken up at the city, where he lived, in the morning, and set down there at night; and he should, I think, be regarded as having been, during the entire interval, the servant of the company, and bound as such to render aid, if necessary, in promoting the passage of the train both to and from the city. This is decisive of the case."¹

And in an English case, where the plaintiff, who was employed by a railway company as a laborer to assist in loading what was called a "pick-up train" with materials left by plate-layers and others upon the line, and where one of the terms of his engagement was that he should be carried by the train from Birmingham (where he resided and whence the train started) to the spot at which his work for the day was to be done, and be brought back to Birmingham after his day's work was done, it was held that while travelling to Birmingham at the end of the day, he did not hold the relation of a passenger to the railway company.² So, also, it was held that a person employed by a railroad company by the day, to work as a carpenter in repairing fences along the line of the road, in repairing bridges, making switch-frames, and other similar work, and who received permission, at the time he was engaged, to ride to his work without paying fare, could not maintain an action against the company for injuries occasioned to him while being so carried, by the negligence of their servants.³

In Indiana the question we are now considering came up in a case where a carpenter was employed by a railroad company to frame and build a bridge across a certain creek on their road. While he was thus engaged in the work, the company directed him to proceed in their cars to another place and assist in loading timbers for the bridge; and while riding on their cars as he was directed, he was injured by the negligence of the defendants' servants. The court held that at the time of the injury the plaintiff was a passenger, placing it upon the ground that his business of house-carpenter, as applied to the erection of a bridge, did not even remotely link him with the careless management of that particular train. He had no particular duties the neglect of which contributed to the injury complained of.⁴ This case was followed by another in the

¹ *Russell v. Hudson River R. Co.*, 17 N. Y. 134.

² *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291; *s. c.* 12 Jur. (N. S.) 691. See also *Hutchinson v. York etc. R. Co.*, 6 Eng. Rail. Cas. 580.

³ *Seaver v. Boston etc. R. Co.*, 14 Gray, 466.

⁴ *Gillenwater v. Madison etc. R. Co.*, 5 Ind. 339. See this and the foregoing case disapproved in *Columbus etc. R. Co. v. Arnold*, 31 Ind. 182.

Persons attending Passengers.

same State, where the facts were almost identical with the "gravel-train cases" heretofore stated; and upon the authority of it it was held that a laborer returning to his home on board of a gravel-train at night after his day's work was done, paying no fare, either directly or indirectly, was a passenger at that time.¹

A case in Pennsylvania reviews a number of the authorities, and distinguishes some of them. The plaintiff was a journeyman carpenter in the employ of the defendants, a railroad company, and was engaged in repairing a bridge about fifteen miles from where the plaintiff lived. The accident by which he was injured occurred while he was returning from his work to his home, on a train, at night. The plaintiff was not hired to pursue his work on the train, but was carried in consideration of a reduction in the price of his wages. When his day's work was done he was no longer in the service of the company, but was free to go or to stay; and when he travelled, he in effect paid his fare out of his wages, for he was hired at a less price per day than if he had paid his fare in money. It was held that while so travelling to and from his work he was a passenger.²

All of the cases thus far noticed on this subject have been cases where the employee was travelling to or from his work; but the question has presented itself where the employee has been travelling on his own business on his employer's conveyance. It would seem that in such a case the employee would stand towards the carrier in the relation of passenger.³

§ 7. **Persons attending Passengers arriving or departing.**—Of course, a person who goes to a train or boat for the purpose of seeing a passenger off, or to assist or welcome one arriving, cannot be regarded as a passenger. Yet it seems that he ought not to be held to be a mere trespasser in entering the conveyance, depot, or wharf of the carrier. But it was held in a Massachusetts case,⁴ where a lady had conducted and assisted into the cars her aunt, who was aged and infirm and affected by disease of the heart, and unable to enter the cars without assistance, and where, after she had left her aunt and was leaving the cars, she was, while attempting to step on the platform after the cars had commenced to move, precipitated under the wheels and injured, that she had no cause of action. The reason was that "the rules and regulations prescribed by a railroad company in relation to the departure of trains and for giving notice to passengers do not extend to persons who are not passengers, with

¹ *Fitzpatrick v. New Albany etc. R. Co.*, 7 Ind. 436.

² *O'Donnell v. Allegheny etc. R. Co.*, 59 Pa. St. 239; *s. c.* 50 Pa. St. 490. See also *Cumberland etc. R. Co. v. Myers*, 55 Pa. St. 238; *Kansas Pacific R. Co. v. Salmon*, 11 Kan. 83; *s. c.* 14 Kan. 512. For cases of contractors' workmen being carried on train, see *Torpy v. Grand Trunk R. Co.*, 20 Upper Canada Q. B. 446; *Sheerman v. Toronto etc. R. Co.*, 34 Upper Canada, Q. B. 451; and *Graham v. Toronto etc. R. Co.*, 23 Upper Canada C. P. 541. There is no implied contract between the owners of a ship and a pilot whom they

are compelled to employ, that the pilot shall take upon himself the risk of injury from the negligence of the ship-owners' servants. *Smith v. Steele*, L. R. 10 Q. B. 125.

³ *Ohio etc. R. Co. v. Muhling*, 30 Ill. 9. But see *Higgins v. Hannibal etc. R. Co.*, 36 Mo. 418. In the days of slavery, it was held that railroad companies were legally responsible for injuries to slaves hired to aid in conducting trains, where the injury was the result of carelessness of their agents. *Louisville etc. R. Co. v. Yandell*, 17 B. Mon. 586.

⁴ *Lucas v. New Bedford etc. R. Co.*, 6 Gray, 64.

Notes.

or without compensation, or who are on the premises without request or instance of the company, and therefore the omission to comply with such regulation is no ground of complaint by one who is not a passenger, if, under the circumstances, the company used ordinary care."¹ And it was further said: "Persons entering the cars who are not passengers, and without the request or instance of the company, are bound to know the time of departure (if such time be fixed, and reasonable public notice given thereof), and to leave the cars in such season before the time so fixed as would enable them to get out with care before the cars are set in motion. With the arrival of time fixed for the departure of the cars, the implied license or permission ceased, and with it the liability of the defendants except in case of misfeasance or gross negligence."² Whether the usual signals for leaving had been given or not was treated as an inquiry of no importance, on the ground that the lady (who escorted her aunt into the cars) was where she had no right to be, namely, on the step of the car.

In a case in Missouri, where the facts were similar, we think the better view of the law was taken. The plaintiff was injured in attempting to leave a train to which he had attended his sister-in-law, with her infant child, at night, and upon which the lady and child became passengers. After referring to the case we have just stated, the court said: "We should be very reluctant to hold that an aged or infirm mother, or sister, or wife, or indeed any other woman, especially if encumbered with an infant child, should not be allowed the assistance of a male friend or relative in getting a seat upon a railroad car, and that such friend or relative was to be treated as a mere stranger to the company, having no claim upon the company for an injury under any circumstances. Not being a passenger, it is conceded that no extraordinary care was required; but whether the neglect of customary signals would not amount to ordinary negligence is a matter upon which the Massachusetts decision is not satisfactory."³ So, in a case where a depot-platform gave way on account of a great crowd which had assembled to hear the President of the United States speak, and many persons were thereby injured and some killed, the court said: "Had it been the hour for the arrival or departure of a train, and he [the plaintiff] had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of the defendants, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who could stand on it; as to all others, they were liable only for wanton or intentional injury. The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendants had nothing to do with that."⁴

§ 8. *Passenger temporarily absent from Conveyance, etc.*—As we have seen, it is not necessary that a person should be on the conveyance, before the relation of passenger and carrier begins. So, too, the relation may exist at a time when the person who has been a passenger on the conveyance is

¹ *Lucas v. New Bedford etc. R. Co.*, 6 Gray, 67.

² *Ibid.*

³ *Doss v. Missouri etc. R. Co.*, 59 Mo. 27, 35.

⁴ *Gillis v. Pennsylvania R. Co.*, 59 Pa. St. 129, 143; s. c. 8 Am. L. Reg. (N. s.) 729. See also *Keokuk Packet Co. v. Henry*, 50 Ill. 264.

Evidence — Burden of Proof.

temporarily absent from it,¹—as where a passenger is walking on a platform of a depot provided for the convenience of passengers while the train is stopping for refreshments.² So, too, he may be a passenger although at the time he has left one conveyance and is walking to get on another.³ Thus, a lady had issued to her a policy of insurance against accident, which insured her life in the sum of \$5,000 in the event of her death from personal injury, “when caused by any accident *while travelling by public or private conveyance* provided for the transportation of passengers.” In the course of a journey by a connecting steamboat and railway line she fell upon a slippery sidewalk, while walking from the steamboat-landing to the railway-station as was usual for travellers on that route, and thereby received injuries which caused her death. It was held (it appearing that she was so walking in the actual prosecution of her journey) that the death was covered by the terms of the policy, and that she was to be regarded as having received the injury while travelling by public conveyance. It was further held in that case that the fact that there were hacks by which the deceased might have ridden from the landing to the station did not affect the question, it being the general custom for passengers to walk.⁴ But if the person has left the conveyance with no intention of returning, and is not pursuing, as it were, a continuous line of travel, as in the last case stated, the relation of passenger and carrier ceases with the passenger’s departure from the conveyance,—certainly when he has left the wharf or depot connecting therewith,⁵—and the going back to the conveyance after having left it, for some purpose of his own, with no intention to continue his journey, would not revive the relation of passenger and carrier which had terminated by his leaving it.⁶

§ 9. Evidence as to who is a Passenger — Burden of Proof — Employee’s Pass — Evidence to show that the Train is a Passenger Train. — Every one riding in a railroad car or other conveyance of a carrier is presumed *prima facie* to be there lawfully as a passenger, having paid, or being liable when called on to pay his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser.⁷ But it would be error to exclude the introduction in evidence of a ticket which stated upon its face that it was a pass to the plaintiff, who was suing a railroad company for injuries received by him through the alleged negligence of the defendant’s agents, and described him as “route-agent, an employee of the Pennsylvania Railroad Company,” which was the name of the defendant. The court, in such a case, said: “The evidence offered was, of course, to show that the plaintiff accepted and used this ticket. It certainly was an admission by him that he bore to the plaintiff in error the relation of employee or servant. It was not, indeed, conclusive, not an estoppel, if explained so as to show that he was really not in the employ of the company, but, as was alleged, received and

¹ *Keokuk etc. Packet Co. v. True*, 88 Ill. 608; *Clusman v. Long Island R. Co.*, 9 Hun, 618 (*s. c.* affirmed, 73 N. Y. 606).

² *Jeffersonville etc. R. Co. v. Riley*, 39 Ind. 568.

³ *Hulbert v. New York etc. R. Co.*, 40 N. Y. 145.

⁴ *Northrup v. Railway Passengers’ Assur. Co.*, 43 N. Y. 516. See also *Theobald v. Rail-*

way Passengers’ Assur. Co., 26 Eng. Law & Eq. 432.

⁵ *Platt v. Forty-second Street etc. R. Co.*, 4 Thomp. & C. 406.

⁶ *Pittsburgh etc. R. Co. v. Krouse*, 30 Ohio St. 222.

⁷ *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339; *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139.

Notes.

used the ticket as a route-agent in the service of the post-office department of the government of the United States, under a contract between that department and the company for carrying the mails. * * * The plaintiff in error had a right to have the whole evidence go to the jury."¹ Where railroad companies permit passengers to be usually carried on some of their freight-trains, if persons go aboard one of their trains supposing it in good faith to be one of those on which passengers are thus carried, and are not informed to the contrary before receiving injuries to their persons, caused by the mismanagement of the train, and there being nothing in the situation or condition of the train showing that passengers are not carried upon it as well as upon any other freight-trains, such persons will have the rights of passengers in respect to such injuries, although they were not in the habit of carrying passengers on that train; and especially will this be so if they are directed to go aboard by the conductor of the train, although such conductor has in fact no authority from the company for that purpose. In such a case, the jury might find that such persons were aboard such a freight-train as passengers. And it would be competent for such persons, in a suit for damages for injuries received by them while on such trains, to introduce in evidence conversations held by them at the time with the person who directed them to the train, tending to show that he was an employee of the company.²

§ 10. **Persons employed on a Private Car—Slaves carried for Hire.**—While a person in charge of a private car, or employed thereon, which is attached to a railroad train, cannot strictly be considered a passenger, yet he certainly is entitled to the rights of a passenger so far as an injury to him is concerned. And he cannot be regarded as an employee of the railroad company so as to preclude him from recovering for injuries received through the negligence of employees of the company.³ It was early held in the United States Supreme Court that slaves being carried for hire occupied the relation of passengers to the carrier.⁴

¹ Penn. R. Co. v. Books, 57 Pa. St. 339.

² Lucas v. Milwaukee etc. R. Co., 33 Wis. 41. See also Dunn v. Grand Trunk R. Co., 58 Me. 187; Creed v. Penn. R. Co., 86 Pa. St. 139; Houston etc. R. Co. v. Moore, 49 Texas, 31.

³ Lockhart v. Lichtenthaler, 46 Pa. St. 151; Lackawanna etc. R. Co. v. Chenewith, 52 Pa. St. 382; Cumberland Valley R. Co. v. Myers, 55 Pa. St. 283.

⁴ Boyce v. Anderson, 2 Pet. 150.

CHAPTER III.

OF THE OBLIGATION OF THE CARRIER TO CARRY ACCORDING TO ADVERTISEMENT OR CONTRACT.

- LEADING CASES:** 1. *Denton v. Great Northern Railway Company*.— Failure of a railway company to transport according to advertised time-tables.
2. *Hawcroft v. Great Northern Railway Company*.— Failure of a railway company to transport according to special contract.
3. *Great Western Railway Company v. Pocock*.— Railway ticket for one part of route not good for another part.

- NOTES:** § 1. What the ticket is.
2. Failure to transport according to contract.
3. Duty to run trains on schedule time.
4. Special contracts for carriage.
5. Right to stop off and resume journey on the same ticket.
6. Limited tickets.
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1. FAILURE OF A RAILWAY COMPANY TO TRANSPORT ACCORDING TO ADVERTISED TIME-TABLES.

DENTON *v.* GREAT NORTHERN RAILWAY COMPANY.*

English Court of Queen's Bench, 1856.

The Right Hon. JOHN LORD CAMPBELL, *Chief Justice*.

Sir JOHN TAYLOR COLERIDGE, Kt.,	} <i>Justices.</i>
“ WILLIAM WIGHTMAN, Kt.,	
“ WILLIAM ERLE, Kt.,	
“ CHARLES CROMPTON, Kt.,	

A railway company which advertises to transport passengers between two given points within certain hours of each day, knowing that it cannot so transport passengers owing to the discontinuance of a train on a connecting line, must pay to a person who on the faith of such advertisement has come to its station to be so transported the damages he has sustained by reason of the delay.

At the hearing of a plaint before the judge of the Bloomsbury County Court of Middlesex, the judge of the County Court suggested

* Reported, 5 El. & Bl. 860.

Denton v. Great Northern Railway Company.

to the parties that, as the question was of general importance and there was no power of appeal, the amount claimed in the plaint being under £20, it was desirable that the plaint should be removed by *certiorari* into one of the superior courts, with a view of stating a case for the opinion of the court on the facts then found by him. The parties having acceded to this course, the plaint was removed by *certiorari* into this court; and by order of a judge a case was stated, of which what follows is an abridgment.

The plaintiff being in London in March, 1855, and having business at Peterborough on the 25th of March, 1855, and at Hull on the 26th of March, 1855, consulted the printed time-tables issued in the usual way by the defendants for that month. In these time-tables a train was advertised to leave London at 5 p. m., and reach Peterborough about 7 p. m., and thence to proceed, amongst other towns, to Hull, to arrive there about midnight. At the bottom of the time-tables was the following notice: "The companies make every exertion that the trains shall be punctual, but their arrival and departure at the time stated will not be guaranteed, nor will the companies hold themselves responsible for delay, or any consequences arising therefrom." The time-tables advertising this train were till after the 26th of March exhibited by the defendants at their stations, where the plaintiff had seen them, and were printed and circulated, and on the 25th of March the plaintiff had one in his possession.

The plaintiff, having made his arrangements on the faith of these time-tables, went down to Peterborough by an early train of the defendants, transacted his business at Peterborough, and went to the defendants' station at Peterborough in due time to take a ticket to Hull by the evening train so advertised; but there was no such train to Hull, nor had there been one during any part of the month of March. The explanation of this was that the whole line of railway from Peterborough to Hull was not the property of the defendants, their line ending at Askerne on the route from Peterborough to Hull. They had running powers over the line of the Lancashire and Yorkshire Railway Company from Askerne to Milford Junction, where the line of the North-Eastern Railway Company joins that of the Lancashire and Yorkshire Railway Company. There had been in February an arrangement between the three companies by which passengers booked at the stations on the line of the Great Northern Railway Company were carried in the carriages of that company to Milford Junction, and thence were conveyed by the North-Eastern Railway Company to Hull by a train departing a few minutes after the arrival of the train leaving

English Court of Queen's Bench.

Peterborough about 7 P. M. Towards the end of February, prior to the publication by the defendants of their time-tables, but after they had been prepared and printed, the North-Eastern Railway Company gave notice to the defendants that after the first day of March the train from Milford Junction to Hull would be discontinued. The defendants nevertheless made no alteration in their time-tables, which were published and issued for March. The plaintiff consulted them and was misled as above stated. In consequence of the absence of this train the plaintiff could not get to Hull in time for an appointment which he had made for the morning of the 26th of March, and sustained damage to the amount of £5 10s. It did not appear in or by the time-tables whether the train from Peterborough to Hull was or was not entirely under the control of the defendants. The question for the opinion of the court was whether the plaintiff was entitled to recover.

Maynard, for the plaintiff. — The publication of the time-tables amounted to a contract to have a train as advertised for the use of those who would come to use it. It is analogous to the cases in which an advertisement offering a reward for a service has been held to amount to a contract to pay it, made with any person who performed the condition.¹ Besides, the defendants are carriers, who have professed to carry to Hull. The obligation of a carrier is to carry "according to his public profession;" *per* PARKE, B., in *Johnson v. Midland Railway Company*.² [CROMPTON, J. — Carriers of goods have that obligation, but are there any cases showing that there is the same obligation on carriers of passengers? There may be a distinction between them. I do not say that there is one.] The point whether there was such a distinction was mooted in *Benett v. The Peninsular Steamboat Company*,³ but it did not become necessary to decide it. At all events, the plaintiff is entitled to recover, as he was induced to act on a representation made by the authorized servants of the defendants which at the time it was made they knew to be false.

Hugh Hill, contra. — First, there is no contract. [Lord CAMPBELL, C. J. — The defendants are not owners of the whole line to Hull; but I think that where there is a contract for carriage from one terminus to another, actually made with a railway company, it has been held immaterial how many companies intervened.] It was first so decided in *Muschamp v. Lancaster and Preston Junction Railway Company*,⁴ which has often been acted upon; so that, no doubt, if the plaintiff had

¹ *Williams v. Carwardine*, 4 Barn. & Adol. 621. See *Gerhard v. Bates*, 2 El. & Bl. 476.

² 4 Exch. 367.

³ 6 C. B. 775.

⁴ 8 Mee. & W. 421.

Denton v. Great Northern Railway Company.

obtained a ticket for Hull, the defendants would have been answerable for not taking him there, for the ticket would have been a contract. But the question here is whether they have agreed to give a ticket to any one who may come. If it is a contract, it is an absolute contract, and whatever happens they must run a train as soon as practicable, even though there was a convulsion of nature.¹ In the cases as to rewards, the advertisement is a request to do certain work, for which the advertiser promises to pay; but this is no more than a statement that they intend to run a train. If that is held to be a contract, the consequences may be alarming. If a ship is once advertised as being about to sail as a general ship, the owner has, according to this, made a contract with every one who chooses to come to offer goods or freight, that he shall not change its destination. A mere publication of an intention is not a contract. In 1 Rolle's *Abridgment*, 6, tit. "*Action sur Case*," M, pl. 1, it is said: "*Si soit communication enter le pere de A. et B. pur un mariage enter le dit A. et le file de B., et B. tunc et ibidem affirme et publish al pere de A. quod daret ei qui maritaret la dit file per son assent £100, et puis A. marry le file de B. per son assent, uncore cest affirmance et publicacion de B. ne raisera auscun promise, sur que un action sur assumpsit poet estre port; pur ces que les ditz parolls ne include auscun promise.*" Then, as to the supposed false representation. It appears by the case that when the tables were printed they were accurate enough; there was no legal duty on them to print new time-tables. [CROMPTON, J. — It is not the original printing that makes against your clients; but they continue to issue them as representations that there was such a train after they knew that there was not. It was a natural consequence of such a representation that the plaintiff should act as he did; and he was by the representation induced to act. If these circumstances concur, there is a remedy by action, though not if any one of them is wanting.²]

Maynard was not called upon to reply.

LORD CAMPBELL, C. J. — This is a case of some importance, both as regards the public and the railway companies. It seems to me that the representations made by railway companies in their time-tables cannot be treated as mere waste paper; and in the present case I think the plaintiff is entitled to recover, on the ground that there was a contract with him, and also on the ground that there was a false representation by the company.

¹ Anonymous, 1 Dyer, 33 a, pl. 10; Walton v. Waterhouse, 2 Saund. 421 a, note 2.

² Taylor v. Ashton, 11 Mee. & W. 401.

English Court of Queen's Bench.

It seems to me that if the company promised to give tickets for a train running at a particular hour to a particular place, to any one who would come to the station and tender the price of the ticket, it is a good contract with any one who so comes. I take it to be clear that the issuing of the time-tables in this way amounts in fact to such a promise; any one who reads them would so understand them. Then, is it a good contract in law? The consideration is one which is a prejudice to the person who makes his arrangements with a view to the fulfilment of the contract, and comes to the station on the faith of it. Is it not, then, within the principle of those cases in which it has been held that an action lies on a contract to pay a reward? There the promise is to the public at large, exactly as it is here; it is in effect the same as if made to each individual conditionally; and, on an individual fulfilling the condition, it is an absolute contract with him, and he may sue. That being so, there is, I think, a contract; and there is no excuse shown for breaking it. It is immaterial that the defendants are not owners of the line the whole way to Hull. It is admitted to have been often rightly held that where there is a ticket taken out to go to a station, the contract binds the company issuing the ticket, though it is not specified how much of the line over which the journey is to be belongs to that company. Then reliance is placed on the class of cases which decide that an absolute contract must be fulfilled whatever happens, which, it is said, shows that there cannot be a contract here. But from the nature of the contract I think there might be implied exceptions. A carrier by sea excepts the perils of the sea. It may be, from the nature of this contract, that the perils of the railroad are excepted. I see no inconvenience likely to arise from holding this a contract. It is put, as an example of inconvenience, that a ship-owner who has advertised that his ship is bound for Calcutta as a general ship, and that he will take on board goods brought to her, would be liable to an action if, when goods are brought on the faith of the advertisement, he said he had got a better freight, and was now bound for Jamaica; but I see no reason why he should not be liable. It seems to me, therefore, that this is a contract, and that the plaintiff, who has acted on it, has his remedy on that ground. But on the other ground there is no doubt. The statement in the time-tables was untrue, and was made so as to be what the law calls a fraudulent representation. It was not the original printing that was blamable; but after notice that the train was withdrawn the defendants continue, down to the 25th of March, to issue these tables. Was not that a representation that there was such a train? And, as they knew it had been discontinued for some time, was it not

Denton v. Great Northern Railway Company.

a false representation? It is all one as if a person duly authorized by the company had, knowing it was not true, said to the plaintiff, "There is a train from Milford Junction to Hull at that hour." The plaintiff believes this, acts upon it, and sustains loss. It is well established law that where a person makes an untrue statement, knowing it to be untrue, to another, who is induced to act upon it, an action lies. The facts bring the case within that rule.

(COLERIDGE, J., was absent.)

WIGHTMAN, J. — It seems to me that the publication of these time-tables amounted to a promise to any one of the public who would come to the station and pay for a ticket that he shall have one by the train at seven. It is said that this will make the company liable though there be inevitable accidents. But the provision at the foot of the time-tables protects the company in cases of delay by accidents, though the proviso does not apply to the present case, where the train is altogether taken off.

But, whether there be a contract or not, the defendants are liable as having induced the plaintiff, by a continued knowingly false representation, to believe that there was a train at seven to Hull; which he, believing, acted upon to his prejudice. All the essentials for an action for a false representation are here. The representation is untrue; it is known by the persons making it to be untrue; it is calculated to induce the plaintiff to act; and he, believing it, is induced to act accordingly.

CROMPTON, J. — I also think that the plaintiff is entitled to judgment. I entirely agree in what has been said by my lord and my brother WIGHTMAN, that an action in the nature of an action for deceit lies here. The company make a fresh statement at every moment whilst they continue to hold out these time-tables as theirs. I am, besides, much inclined to think that they are liable also on the ground that they have committed a breach of their duty as public carriers. A public carrier of goods must carry according to his public profession. I think, however, that there has been no decision that carriers of passengers are under the same obligation; though in *Story on Bailments*¹ it is said they are. I cannot doubt that the defendants publicly professed to be carriers of passengers by this train; and therefore I am inclined to think an action would lie on that ground. But I am not prepared to say that there is a contract. As I agree that the defendants are liable, there is no occasion to decide this; and it is true that the cases as to the recovery of rewards have an analogy to this case. But there is a

English Court of Queen's Bench.

difference: where a reward is offered, it is generally offered to procure a service which is entirely performed by the party claiming the reward. I never was able to see any good reason why in such cases he might not sue for work and labor done at the request of the defendant. But in the present case, or in that which might be put of a shopkeeper advertising that he had cheap goods in his shop, I doubt if the labor of coming to the station, or of crossing the threshold of the shop, really is part of the consideration at all. If it be, it is a very small one. I agree, however, that any consideration, however small, will support a promise; and perhaps the difference between me and my lord and my brother WIGHTMAN is rather as to the fact than the law. I doubt whether the promise here, in fact, was in consideration of coming to the station. If it was, I see difficulty in saying that the shopkeeper does not promise to have his wares for those who will take the trouble to leave the street and come into his shop. But it is quite unnecessary, for the decision of this case, to come to a determination on that. I am clearly of opinion that the action lies as for false representation. I think, though less decidedly, that it lies on the ground of their duty as public carriers of passengers to act up to their public professions. But I doubt whether they are answerable on a contract to do all that may be found in the time-tables, if there be any thing there beyond what would be implied as part of their duty as carriers.

Judgment for plaintiff.

2. FAILURE OF A RAILWAY COMPANY TO TRANSPORT ACCORDING TO SPECIAL CONTRACT.

HAWCROFT v. GREAT NORTHERN RAILWAY COMPANY.*

English Court of Queen's Bench, 1852.

The Right Hon. JOHN LORD CAMPBELL, *Chief Justice.*

Sir JOHN PATTESON, Kt.,

" JOHN TAYLOR COLERIDGE, Kt.,

" WILLIAM WIGHTMAN, Kt.,

" WILLIAM ERLE, Kt.,

} *Justices.*

Railway Company—Excursion Ticket—Special Contract.—Excursion tickets were issued by the G. N. R. Co., at B., to convey passengers to L. and back, by any train

* Reported, 21 L. J. (Q. B.) 178; 16 Jur. 196; 8 Eng. Law. & Eq. 362. This case was heard before Patteson and Wightman, JJ.

Hawcroft v. Great Northern Railway Company.

advertised for that purpose, within the following fourteen days. B. was not on the line of the G. N. R. Co., but on that of the S. Y. R. Co., which joined the other line at D. Two trains a day (morning and evening) were then advertised for the conveyance back from L. in pursuance of the notice on the ticket; but B. was not mentioned in the advertisement as one of the stations at which either one of those trains would stop, although D. was so mentioned. H., who had taken one of the tickets at B. and had been conveyed to L., returned within the fourteen days by one of the evening trains, and on arriving at D. the next morning found that there was no train for B. on that day. He posted to B., and sued the company for the expense of so doing. *Held*, that he was entitled to recover. *Semble*, a railway company are not excused from carrying passengers according to their contract upon the ground that there is no room for them in the train; but in order to avail themselves of this answer, they should make their contract conditional upon there being room.

APPEAL from the County Court of Yorkshire, holden at Barnsley. The action was brought to recover damages for the alleged neglect and refusal of the defendants to convey the plaintiff from London to Barnsley. It appeared from the case that the following facts were proved or admitted on the trial: During the period of the great exhibition in Hyde Park, the defendants were in the habit of issuing tickets for the conveyance of passengers by the Great Northern Railway, from various places on the line of such railway to London and back, at a low price, by certain tickets called "excursion tickets." On the 2d of August, 1851, the plaintiff, who is a confectioner residing at Barnsley in Yorkshire, purchased one of these tickets at the Barnsley station, for which he paid 5s., and which was in the following form:—

"GREAT EXHIBITION.

"Barnsley to King's Cross and back.

"*Third Class.*"

And upon the back of such ticket was the following notice:—

"EXCURSION TICKET.

"To return by the trains advertised for that purpose, on any day not beyond fourteen days after date hereof."

The defendants advertised certain trains called "Exhibition trains" as those which would leave the King's Cross station during the month of August for the conveyance from London of persons holding excursion tickets. The hours at which the trains would arrive at various places on the line of railway were mentioned in the advertisements. Barnsley was not among such places; but the times when they would arrive at Doncaster were mentioned, and a passenger travelling by the defendants' railway from London to Barnsley would proceed to Don-

caster, and be conveyed from thence to Barnsley by a train of the South Yorkshire Railway Company, the Barnsley station being situate on the South Yorkshire Railway and not upon the line of the Great Northern, the South Yorkshire joining the Great Northern at Doncaster; but it was agreed and admitted on the trial, that for the purposes of this action the ticket should be deemed and taken to have been issued by the authority and as the ticket of the defendants. The plaintiff, on Saturday, the 9th of August, still being the holder of the ticket, presented himself at the King's Cross station at London, shortly before 6 o'clock, in time for the train at 6:45 A. M., for the purpose of returning to Barnsley by the train which was advertised to start at that hour, and which train was admitted to be one of the trains referred to in the ticket. This train left the King's Cross station for the places mentioned in the advertisements; but in consequence of the great pressure of persons wishing to be passengers by it, the plaintiff was unable, although he used every effort to do so, to obtain a seat. The plaintiff then applied to and requested the station-master, who was admitted to be the servant and agent of the defendants, to forward him to Barnsley by a train which was leaving shortly after; but he refused to do so, and told the plaintiff that he must wait for another train. The plaintiff proceeded on the same day by the advertised excursion train which left the King's Cross station at 9:15 P. M., having been kept waiting there from before 6 A. M. This train proceeded to Doncaster, where it arrived on Sunday morning. No trains were run upon Sunday by the South Yorkshire Company, and the plaintiff therefore hired a carriage to convey him to Barnsley. The learned judge decided that there was a special contract between the plaintiff and the defendants, and he ruled that the latter were bound to carry back the plaintiff from London to Barnsley by the train advertised to leave London at 6:45 A. M., or by some other train within a reasonable time after that hour, and that it was not a sufficient compliance with their contract to bring him from London by the train at 9:15 P. M.; and further, that even assuming the not enabling him to leave London until 9:15 P. M. was not a breach of contract, yet they were guilty of a breach in conveying him only as far as Doncaster and not to Barnsley, and that the defendants were liable for not performing their contract. The defendants had therefore brought the present appeal.

Phipson (*Wordsworth* with him), for the appellants.—This is a question of construction, and turns wholly upon the form of the excursion ticket. It is admitted that the ruling of the judge of the County

Hawcroft v. Great Northern Railway Company.

Court would be correct if the ticket is to be read as an absolute contract to carry passengers by any train, on any day, without any limitation.

[WIGHTMAN, J. — The words “on any day” mean on any of the days for which trains are advertised, that the plaintiff pleases.]

Assuming that the plaintiff has the option of choosing his days, has he the option of choosing any train on that day?

[WIGHTMAN, J. — But you limit him to go by the trains advertised for that purpose.]

Two excursion trains went each day. The company might take him by either. They were bound to carry him back only by the trains advertised; there was no train advertised for Barnsley at the hour on which the plaintiff started.

[WIGHTMAN, J. — This was a train advertised for the purpose of conveying back excursion-ticket holders. They know nothing of advertisements relating to trains on the South Yorkshire line. The respondent may have learned the hours from another advertisement than that which contained the names of the places. He had no right to return by other trains than those which were advertised, but he was not bound to see how far they went. He would conclude that the appellants had taken care to make all necessary arrangements with the South Yorkshire Railway Company.]

Barnsley was not mentioned in any of the advertisements. Could the company be sued if they had refused to carry a passenger when there was no room for him? They were common carriers, and bound to carry safely.

[PATTESON, J. — They should have made it a condition of their contract that they would not carry unless there was room.]

Hardy (with him *Hall*), for the respondent, was not called upon.

PATTESON, J. — The question turns upon the meaning of the contract contained in the ticket. The language used is, “to return by the trains advertised for that purpose;” that means to return back to Barnsley, where the ticket was taken. The advertisement says nothing as to the time of arrival at Barnsley, and, being silent, the plaintiff might well suppose that he would be taken there in a reasonable time after his arrival at Doncaster. If any other arrangement was entered into, and it was shown to have been brought to the knowledge of the respondent, the result might be different. An option is given to the party who is to return, whether he will go by the morning or evening train. But as the company could not take him by the morning train, they should have made some arrangement to carry him on to Barnsley by the evening one.

English High Court, Exchequer Division.

WIGHTMAN, J.—The whole question is, What was the contract between the parties? The party taking the ticket had no right to return except by the trains advertised for that purpose, but he had a right to insist upon going by one of those; and it may be that by going by one of them he waived any right to object that he had not been carried by a former one. He certainly ought to have been taken back to Barnsley, unless he was a party to some special arrangement to the contrary.

Judgment affirmed, with costs.

3. RAILWAY TICKET FOR ONE PART OF ROUTE NOT GOOD FOR ANOTHER PART.

GREAT WESTERN RAILWAY COMPANY *v.* POCKOCK.*

English High Court, Exchequer Division, November, 1879.

The Right Hon. Sir FITZROY KELLY, *Lord Chief Baron, President.*

Sir ANTHONY CLEASBY, Kt.,

“ CHARLES EDWARD POLLOCK, Kt.,

“ JOHN WALTER HUDDLESTON, Kt.,

“ HENRY HAWKINS, Kt.,

Barons.

A passenger purchased a ticket from W. to D. and return, and on his return journey from D. to W. went on to P., a station beyond, and refused to pay fare from W. to P. on the ground that a return ticket from P. to D. was the same price as a return ticket from W. to D. *Held*, that as soon as the passenger arrived on his return journey at W. the contract between him and the company was at an end, and he must pay the fare.

This was an appeal from the decision of the County Court judge of Marylebone in favor of the respondent.

The action was brought to recover 3*d.*, the second-class fare from Westbourne Park to Paddington. The respondent took a second-class return ticket from Westbourne Park to West Drayton, for which he paid 2*s.* 6*d.* On his return journey he travelled to Westbourne Park and thence to Paddington, but refused to pay 3*d.*, the fare from Westbourne Park to Paddington, which was demanded by the railway company, on the ground that the return fare from Paddington to West Drayton was the same as the return fare from West-

* Reported, 28 Week. Rep. 49; 10 Cent. L. J. 84.

Great Western Railway Company v. Pocock.

bourne Park to West Drayton, which he had already paid. The company thereupon sued the respondent in the County Court for 3*d.*, the fare demanded. The railway company now appealed against the decision of the County Court judge in favor of the respondent.

Macmorran and *Prankerd*, for the respondent, showed cause. — The ticket is evidence of a contract merely, and not of the terms of the contract entered into between the parties. It is evidence that the passenger has paid his fare, and is only given to the passenger for the purpose of showing what he has paid. [HAWKINS, J. — You say that it is treated only as a receipt for 2*s.* 6*d.* I will tell you what the effect of that would be. A person might take a ticket from Westbourne Park to West Drayton, — he would take that as a receipt for the money, — and he would then go to Bath and use that ticket from Bath to Bristol and back, and when asked for 2*s.* 6*d.*, the fare, he would say, “Here is my receipt,” and would produce his return ticket from Westbourne Park to West Drayton.]

Wright (*R. E. Webster*, Q. C., with him), in support of the rule, was not called on.

HUDDLESTON, B. — In spite of the ingenious argument of Mr. *Macmorran*, and giving him credit for the topics which he has adduced, I think that this appeal must be allowed, and that the judgment must be for the appellants. This really is a question of contract; the ticket undoubtedly contains the contract between the parties; and that contract is that, in consideration of the payment made by the respondent, the appellants agree to carry him from Westbourne Park to West Drayton, and, on the same day, to bring him back from West Drayton to Westbourne Park. When he got back to Westbourne Park the contract was at an end. It is entirely a question of contract; the evidence of the contract is the ticket, and when the terms of the ticket are complied with the contract expires, — in this case, when the respondent arrived back at Westbourne Park; and he was not entitled to travel the other distance except on payment of the fare charged by the company.

HAWKINS, J. — I cannot bring my mind to entertain a shadow of doubt on the question now before us. In my judgment, it is a pure question of contract, which may be put in popular language thus: The company say that in consideration of 2*s.* 6*d.* we agree to carry you from Westbourne Park to West Drayton and back; the moment the passenger has arrived back at Westbourne Park station the contract is fulfilled. If he desires to be carried beyond Westbourne Park to Paddington, he must enter into a new contract. The passenger in this

 Failure to transport according to Contract.

case does not enter into a new contract, and he refuses to do so. The company then do what they have a right to do, demand 3*d.*, which is the fare, and he declines to pay it. I cannot see that there can be any question on the subject.

Rule absolute.

 NOTES.

§ 1. **What the Ticket is.**—The possession of a railroad ticket is not conclusive evidence of the right of the holder to transportation. The circumstances may be such that it will be a proper subject for investigation whether the holder of the ticket has not got possession of it by fraud, or whether it has not been previously used.¹ The possession, however, is *primâ facie* evidence that the holder has paid the regular price for it, and of his right to be transported at some time between the places specified thereon on some passenger-train. If it is unutilized, the presumption is that it has never been used for that purpose.²

A ticket cannot be said to be either the contract or to contain the contract. The settled opinion is that it is a mere receipt, token, or voucher, adopted for convenience, to show that the passenger has paid his fare from one place to another.³ A contract for transportation may, therefore, be proved independently of the terms of the ticket.⁴

§ 2. **Failure to transport according to Contract.**—The failure or refusal of the carrier to receive and transport the passenger confers upon the latter a right of action for consequential damages.⁵ In general, such an action is for the breach of the contract of transportation,⁶ but the action may be in tort, for the violation of a public duty to carry those who present themselves for passage.⁷ Thus, the respondent's vessel having failed to come to take passengers who had procured tickets and were ready to embark, the carrier was held responsible for the consequential delay and damage. Said NELSON, J.: "The winds and waves or weather are no excuse for the non-fulfilment of a contract as to the time of the commencement of the voyage. If these circumstances had been intended

¹ Davis v. Great Western R. Co., 20 Upper Canada Q. B. 27.

² Pier v. Finch, 24 Barb. 514.

³ Quimby v. Vanderbilt, 17 N. Y. 306; Rawson v. Pennsylvania R. Co., 48 N. Y. 212; Johnson v. Concord R. Co., 46 N. H. 213; Gordon v. Manchester etc. R. Co., 52 N. H. 596; The State v. Overton, 24 N. J. L. 435, 438; Boice v. Hudson Riv. R. Co., 61 Barb. 611; Barker v. Coffin, 31 Barb. 556; Elmore v. Sands, 54 N. Y. 512, 515; Henderson v. Stevenson, L. R. 2 Sc. App. 470, per Lord Hatherley.

⁴ Van Buskirk v. Roberts, 31 N. Y. 661; Quimby v. Vanderbilt, *supra*.

⁵ Bennett v. Dutton, *ante*, p. 2; Howard v. Cobb, 19 Law Reporter, 377; Hawcroft v. Great Northern R. Co., 8 Eng. Law & Eq. 362; s. c. 16 Jur. 196; 21 L. J. (Q. B.) 178; *ante*, p. 59; Indianapolis etc. R. Co. v. Birney, 71 Ill. 391.

⁶ "The action is in reality upon a contract; it is commonly said to be founded upon a duty, but it is a duty arising out of a contract." Per Blackburn, J., in Hobbs v. London etc. R. Co., L. R. 10 Q. B. 111, 119.

⁷ Bennett v. Dutton, *supra*; Heirn v. McCaughan, 32 Miss. 17; New Orleans etc. R. Co. v. Hurst, 36 Miss. 660.

Notes.

as elements of it, they should have been expressly provided for by the owner, and then all parties would have understood it."¹ A common carrier engaged in carrying the United States mail, and also in the transportation of passengers, wrote a letter to a postmaster at one of the offices from which he was accustomed to carry the mail, informing him that on a certain day one of his vessels (which did not ordinarily stop and receive a mail or passengers at that place) would stop there; and also requesting the postmaster to have a mail in readiness, and to "advise all who may feel interested in the above." It was held that the expression above quoted did not refer simply to persons interested in the arrival and departure of the mail, but, under the circumstances, included those who wished to take passage on the vessel; and further, that it was competent to introduce parol evidence of the circumstances under which the letter was written, and of the nature of the business in which the defendant was engaged, in order to show that passengers were meant to be included in those having an interest in the arrival and departure of the boat. Therefore the plaintiff and his wife, who relied upon the public notice given in consequence of the letter to the postmaster, and went upon the pier late at night when the vessel was expected to arrive and remained there until morning, and got no passage in consequence of the failure of the vessel to appear, were held to have a cause of action for breach of the duty which the carrier as such owed to the public.²

Carrying a passenger beyond his destination in disregard of his request upon reaching this place to be there put off, will afford a good ground for an action.³ And this is so although no bodily injury, mental suffering, insult, oppression, or pecuniary loss be shown; and though these elements of damage are disclaimed, the passenger acquires a technical right to the recovery of nominal damages.⁴ In order to afford an opportunity to passengers to leave the train at the place of destination, the company is bound to have announced the names of the different stations upon the arrival of the train, and then stop a sufficient length of time to allow passengers to get off without danger or injury to their persons.⁵

It is the duty of the passenger to ascertain what train will stop at his destination. Therefore a passenger who purchased a ticket to a station at which local trains stopped but through trains did not was not entitled to enter the first train due after he purchased the ticket and demand of the conductor that it stop at his station, when by the regulations of the company it was not permitted to do so, as it was a through train.⁶ A passenger was directed by an agent of the carrier

¹ Howard v. Cobb, 19 Law Reporter, 377. See also Williams v. Vanderbilt, 28 N. Y. 217 (affirming s. c. 29 Barb. 491); Van Buskirk v. Roberts, 31 N. Y. 661; West v. Str. Uncle Sam, 1 McAll. 505; Ward v. Vanderbilt, 4 Abb. App. Dec. 521.

² Heirn v. McCaughan, 32 Miss. 17. See also Denton v. Great Northern R. Co., ante, p. 53. If the officer of a boat expressly contracts to land a passenger at a particular point, with a knowledge of the danger of landing there, such danger will afford no excuse for a failure to comply with the contract. Porter v. The New England, 17 Mo. 290.

³ New Orleans etc. R. Co. v. Hurst, 36 Miss.

660; Porter v. The New England, 17 Mo. 290; Pittsburgh etc. R. Co. v. Nuzum, 50 Ind. 141; Mobile etc. R. Co. v. McArthur, 43 Miss. 180; Memphis etc. R. Co. v. Whitfield, 44 Miss. 466; Sunday v. Gordon, 1 Blatchf. & H. Adm. 569.

⁴ Thompson v. New Orleans etc. R. Co., 50 Miss. 315. See also New Orleans etc. R. Co. v. Statham, 42 Miss. 607.

⁵ Southern R. Co. v. Kendrick, 40 Miss. 375; Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 294; New Orleans etc. R. Co. v. Statham, supra.

⁶ Pittsburgh etc. R. Co. v. Nuzum, 50 Ind. 141. See also Ohio etc. R. Co. v. Applewhite,

Running Trains on Schedule Time.

to a train then standing in his sight, as one which would convey him to L., his destination. That train, after running one hundred and fifty miles, deflected at S. to a branch road not passing through L., but was followed an hour afterwards by another train, starting from the same place, which passed through S. and thence on to L. The passenger should have got off at S. and waited for this last train. It was held that the passenger was in fault for being miscarried if at or before reaching the point of divergence the carrier used such means as would have conveyed to a person of ordinary intelligence, using reasonable care and attention, information of the necessity of his transferring himself to the second train.¹ If the passenger, in such a case, discovered the mistake so that he might have returned to the junction without charge by another train, in season to have taken the train going to his destination, he ought to have done so. His refusal to leave the cars or pay his fare on the route he was then travelling justified his expulsion from the train.²

It is undoubtedly the duty of the carrier to provide passengers with seats,³ and they cannot be left standing without a breach of the contract of carriage: therefore a passenger may decline to surrender his ticket until he has been furnished with a seat. But he cannot do this and remain upon the train. He should quit the train at the first suitable opportunity, and bring action upon his contract. He cannot insist upon riding in a standing position until a seat becomes vacant.⁴

§ 3. Duty to run Trains on Schedule Time. — It is the duty of a railroad company to exercise due and reasonable precaution and foresight that their trains shall arrive and depart from stations at the time advertised in the time-tables. Therefore a company whose line connects with another, and which has been accustomed to run its trains in connection with those of the latter, and continues to advertise to do so although the trains no longer run in connection with each other, will be responsible in damages to a person who has made his arrangements accordingly, and only learned that the trains did not make connections when he applied for his ticket.⁵ But the mere fact that a passenger has a ticket with the imprint "Cardiff to Newcastle, *via* Midland Railway," does not of itself prove a contract or duty whereby the company issuing such ticket is bound to have their train run in connection with a train upon the "Midland Railway" running to Newcastle. Neither will representations of the train-men have this effect. The time-tables of the company should be introduced for this purpose.⁶ But, in the absence of a special contract for transportation, railroad companies

52 Ind. 540; Chicago etc. R. Co. v. Randolph, 53 Ill. 510; Fink v. Albany etc. R. Co., 4 Lans. 147. Even though in such a case the conductor takes up the ticket of the passenger, and agrees to let the passenger off at the station as requested, this will not bind the company to do so. The duty of the conductor is to run the train according to the public arrangements, and he has no power to change them. Ohio etc. R. Co. v. Hatton, 60 Ind. 12; s. c. 6 Cent. L. J. 389. See also Chicago etc. R. Co. v. Randolph, *supra*

¹ Barker v. New York etc. R. Co., 24 N. Y. 599. Compare Hobbs v. London etc. R. Co., L. R. 10 Q. B. 111.

² Barker v. New York etc. R. Co., *supra*; s. c. *sub nom.* Page v. New York etc. R. Co., 6 Duer, 523.

³ Bass v. Chicago etc. R. Co., 36 Wis. 450; s. c. 39 Wis. 636; 42 Wis. 654; Willis v. Long Island etc. R. Co., 34 N. Y. 670; s. c. 32 Barb. 399.

⁴ Davis v. Kansas etc. R. Co., 53 Mo. 317.

⁵ Denton v. Great Northern R. Co., 5 El. & Bl. 860, *ante*, p. 53. See also Hamlin v. Great Northern R. Co., 1 Hurl. & N. 408; Heirn v. McCaughan, 32 Miss. 17.

⁶ Hurst v. Great Western R. Co., 19 C. B. (N. S.) 310; s. c. 11 Jur. (N. S.) 730; 34 L. J. (C. P.) 264; 13 Week. Rep. 950; 12 L. T. (N. S.)

Notes.

cannot be held to be warrantors or insurers that trains shall arrive and depart precisely as indicated by the time-table. The publication of a time-table imposes upon the company only the obligation to use due care and skill to accomplish this result. Therefore, where the train of the defendants was on account of circumstances which could not be ordinarily anticipated greatly overloaded, so that it was necessary to drive past one of its stations, on an up-grade, without stopping, whereby the plaintiff, a season-ticket holder, failed to get transportation as usual, it was held that the company were not liable, as they had done all that due care and skill could suggest to transport the plaintiff punctually, especially as an extra train had been sent back for the accommodation of the plaintiff and others who had been inconvenienced.¹ Any detention which is due to wilful and unreasonable delay of the conductor in charge of the train is properly attributable to the company itself, upon the familiar principle that if servants execute the business of their master in this manner, he will be held responsible.²

Changes, when made in the time-tables, should be given all the publicity of the tables themselves; therefore, where the railroad company was in the habit of keeping a standing advertisement of its time-tables in the leading city papers, it was held that it was not sufficient notice to the patrons of the road of a change in the time of running one of its trains on a certain evening, that printed notices to this effect were posted in the cars and stations of the road on the day of the change and for a day or two previous. Although the plaintiff rode upon the cars on the day of the change, no legal presumption that he saw the notice arose from the fact of their being posted up.³

§ 4. *Special Contracts for Carriage.*—Special contracts may be made between the carrier and passenger which will superadd to his general liability. Thus, although there is no obligation incumbent on the carrier to transport a person tendering the customary fare upon Sunday, yet an express contract may be made by virtue of which the carrier will be bound to do so.⁴ Ordinarily, the carrier would be excused from attempting to land a passenger under circumstances of danger, but if this condition of things is known to the carrier's officer at the time the agreement to transport is made, a failure to do so will afford a cause of action.⁵ If a passenger has contracted for a particular seat, he cannot be compelled to take another,⁶ and he may take his seat at any time during the journey, and the carrier's agent is not justified in filling his place with another passenger.⁷ The conductor of a railway train has no authority to make an agreement with a passenger in violation of the public arrangements for operating the road.⁸ Passengers riding upon commutation tickets are bound strictly by the terms of the contract in such cases, and if the contract requires

634. In England the companies now generally protect themselves against the consequences of any irregularity in the running of their trains, by inserting notices in their time-tables to the effect that they do not warrant that the trains will arrive and depart at the precise times indicated. Per Bovill, C. J., in *Lord v. Midland R. Co.*, L. R. 2 C. P. 345.

¹ *Gordon v. Manchester etc. R. Co.*, 52 N. H. 596.

² *Weed v. Panama R. Co.*, 17 N. Y. 362.

³ *Sears v. Eastern R. Co.*, 14 Allen, 433.

⁴ *Walsh v. Chicago etc. R. Co.*, 42 Wis. 23.

⁵ *Porter v. The New England*, 17 Mo. 290.

⁶ *Long v. Horne*, 1 Car. & P. 610.

⁷ *Ker v. Mountain*, 1 Esp. 27.

⁸ *Ohio etc. R. Co. v. Hatton*, 60 Ind. 12; s. c. 6 Cent. L. J. 389.

 Right to stop off and resume Journey.

them to produce such tickets whenever requested, they must do so;¹ and if by the terms of the contract the ticket has expired, by limitation of time or otherwise, although the number of miles' travel guaranteed by its terms have not been exhausted, the company will not be obliged to afford further transportation upon it.² A railroad company may by special contract restrict the holders of a certain class of tickets to a special train, but if the ticket is of such a character in its general appearance as to give the holder no notice of this fact, and he has no information of it, the company will not be justified in ejecting the holder of such a ticket from its regular trains.³

If a railway company has made a special contract for the transportation of passengers upon excursion tickets over their line in connection with another line, it will be responsible for the damages attending its failure to run trains on the return trip in connection with the other line as advertised.⁴

§ 5. Right to stop off and resume Journey on the same Ticket. — It may be stated as a general rule that the contract for conveyance entered into between the carrier and the passenger is an entirety. Neither party can require the other to perform it in parts. The passenger has no right to leave the conveyance at an intermediate point, without the carrier's consent, and afterwards demand that

¹ *Bennett v. Railroad Co.*, 7 Phila. 11; *Downs v. New York etc. R. Co.*, 36 Conn. 287; *Ripley v. New Jersey etc. Transp. Co.*, 31 N. J. L. 388; *Crawford v. Cincinnati etc. R. Co.*, 26 Ohio St. 580; *Woodard v. Eastern Counties R. Co.*, 30 L. J. (M. C.) 196. But see *Maples v. New York etc. R. Co.*, 38 Conn. 557. In *Cooper v. London etc. R. Co.*, 4 Exch. Div. 88, the plaintiff bought from the defendant company a season ticket entitling him to travel by their railway for one month, paying the usual charge for such a ticket and ten shillings deposit, and agreed to be bound by certain conditions. The fourth condition was that the ticket "is to be considered as the property of the company, to be delivered up at the secretary's office on the day after expiry, or on forfeiture." The sixth condition was that "the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company if it shall be lost, or in case of any breach of any of the above conditions." Some few days "after the expiry" the plaintiff delivered up the ticket and claimed the deposit, payment of which was refused on the ground that the ticket should have been presented on the day after expiration. It was held that each of the above conditions was a condition precedent to a right to the return of the deposit; and that, as the ticket had not been delivered up "on the day after expiry," the conditions had not been performed, the deposit was for-

feited, and the plaintiff could not maintain the action.

² *Powell v. Pittsburgh etc. R. Co.*, 25 Ohio St. 70; *Terre Haute etc. R. Co. v. Fitzgerald*, 47 Ind. 79; *Lillis v. St. Louis etc. R. Co.*, 64 Mo. 464; *Sherman v. Chicago etc. R. Co.*, 40 Iowa, 45.

³ *Marony v. Old Colony etc. R. Co.*, 106 Mass. 153; *Nolan v. New York etc. R. Co.*, 9 Jones & Sp. 541. In the late case of *Crosby v. Maine Central R. Co.*, 69 Me. 418, s. c. 8 Reporter, 819, the facts were that a band of musicians was employed by the defendant to attend an excursion from the town of Dexter to Belfast, their compensation being the sum of \$25 and a ticket for a lady to each member of the band. The defendant's agent prepared tickets for the ladies of the members of the band, differing from common tickets, being pieces of cardboard on which was printed "Maine Central R. R., July 30, 1877, Dexter," and nothing more. A brother of the plaintiff, who was a member of the band, gave one of the tickets above described to the plaintiff, who claimed the right to ride upon it, and attempted to do so, but was compelled to leave the train before it reached its destination. In an action for this expulsion, the court below charged that the plaintiff had no right to passage unless by virtue of a special contract; the ticket produced was for a lady, and hence he could claim no rights under it. Exceptions to this charge were overruled.

⁴ *Hawcroft v. Gt. Nor. R. Co.*, ante, p. 59.

Notes.

the contract be completed according to his convenience.¹ Such a rule as this is necessary for the prevention of fraud.² The passenger, on resuming his journey after leaving a railroad train without permission of the conductor, can claim no rights under his ticket. The contract for carriage is broken by his thus leaving the train, and he becomes a trespasser, and may be rightfully ejected from the train.³ The production of a conductor's check or ticket, unless it expressly authorizes the passenger to stop over at such a place, does not enhance the passenger's rights in the premises. Such a check is simply evidence that the fare has been paid for a continuous journey.⁴ Neither will it avail the passenger, under such circumstances, that he was told by an agent of the company at a way-station that he would be at liberty to leave the train and proceed on his journey on another, and that a conductor's check which he held was "good until taken up." The presumption is that a ticket-agent at a way-station has no authority to change or modify contracts between the company and its through passengers; and the *onus* of rebutting such presumption rests with the party alleging the contrary.⁵ A passenger holding a ticket bearing upon its face the stipulation "Good for this day and train only" will not be entitled to leave the train after his journey has commenced, and afterwards, though on the same day, claim passage on this ticket.⁶ Even though it has been customary upon a certain railroad to allow passengers to stop over at stations intermediate upon their journey, without detriment to their right to resume travel upon the same ticket, yet the railroad company may at any time make a regulation to the contrary, and a passenger will be bound by such regulation whether he has notice of it or not.⁷

§ 6. Limited Tickets. — A railway company may make a regulation limiting the time within which the ticket will be received for passage, at the expiration of which time the holder can claim no rights under it.⁸ And where a ticket

¹ *Stone v. Chicago etc. R. Co.*, 47 Iowa, 82; s. c. 10 Ch. Leg. N. 78; 6 Reporter, 489; *Hamilton v. New York etc. R. Co.*, 51 N. Y. 100; *Cheney v. Boston etc. R. Co.*, 11 Mete. 121; *Cleveland etc. R. Co. v. Bartram*, 11 Ohio St. 457; *The State v. Overton*, 24 N. J. L. 435; *Johnson v. Concord R. Co.*, 46 N. H. 213; *Beebe v. Ayers*, 28 Barb. 275; *Drew v. Central Pacific R. Co.*, 51 Cal. 425; *Briggs v. Grand Trunk R. Co.*, 24 Upper Canada Q. B. 510; *Craig v. Great Western R. Co.*, 24 Upper Canada Q. B. 504; *Barker v. Coffin*, 31 Barb. 556; *Breen v. Texas etc. R. Co.*, 50 Texas, 43; *Gale v. Delaware etc. R. Co.*, 7 Hun, 670; *Oil Creek etc. R. Co. v. Clark*, 72 Pa. St. 231; *Terry v. Flushing etc. R. Co.*, 13 Hun, 359; *Dunphy v. Erie R. Co.*, 10 Jones & Sp. 128. But in some States this matter is regulated by statute. In Maine it is enacted (Pub. Laws 1871, chap. 223) that no railroad company shall limit the right of a ticket-holder to any given train; but that such ticket-holder shall have the right to travel on any train, whether regular or express train, and to stop at any of the stations at

which such train stops, and that such ticket shall be good for a passage, as above, for six years from the day it is first used. *Dryden v. Grand Trunk R. Co.*, 60 Me. 512.

² *Beebe v. Ayers*, *supra*.

³ *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432; *Vankirk v. Pennsylvania R. Co.*, 76 Pa. St. 66. As to what effect declarations of the company's ticket-seller or conductor in regard to the right to stop over will have upon the contract for carriage, see *Burnham v. Grand Trunk R. Co.*, 63 Me. 298; *Denny v. New York etc. R. Co.*, 5 Daly, 50; *Vankirk v. Pennsylvania R. Co.*, *supra*.

⁴ *The State v. Overton*, 24 N. J. L. 435; *Cheney v. Boston etc. R. Co.*, 11 Mete. 121; *McClure v. Phila. etc. R. Co.*, 31 Md. 532. But see *Palmer v. Railroad Co.*, 3 So. Car. 580.

⁵ *McClure v. Philadelphia etc. R. Co.*, *supra*.

⁶ *Gale v. Delaware etc. R. Co.*, 7 Hun, 670.

⁷ *Johnson v. Concord etc. R. Co.*, 46 N. H. 213. See also *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432.

⁸ *Hill v. Syracuse etc. R. Co.*, 63 N. Y. 101;

Limited Tickets.

contained the stipulation "Good for this day only," the mere verbal declarations of the company's ticket-agent, made subsequent to the purchase of such ticket, as to its being good at any time thereafter, will not constitute a valid contract in the absence of proof that the agent had authority to make an oral contract for the company, varying the one indicated by the ticket.¹ A commutation ticket good for a certain number of miles of travel, but limited by its terms to be used within a certain time, is worthless after the expiration of such time, and the holder cannot claim transportation under it, although the number of miles of travel guaranteed by it have not yet been exhausted.² Similarly, a commutation ticket good for one thousand miles' travel upon two roads forming one continuous line (issued by a company owning one road and leasing the other), three hundred miles to be travelled upon one road and seven hundred miles to be travelled upon the other, as indicated by differently colored figures, does not entitle the holder to travel upon a division of the road after the number of miles specified for that division have been entirely punched out of the ticket, although there yet remain upon the ticket figures for the other division, not punched out, amounting to the number of miles for which the ticket is offered.³ But a ticket good for a limited time is not to be regarded as good at all events, in whatever manner used. It is good, subject to other regulations of the company. Thus, a ticket bearing upon its face "Good for this day and train only" is good only for one *continuous* passage upon the day of its date.⁴ If a ticket has ceased to be good for the reason that it is a limited ticket and the limitation has expired, or because the holder has forfeited his rights under it, the railroad company does not waive its right to refuse to carry the holder of it merely because the ticket has been afterwards punched by a baggage-man,⁵ or even recognized by one of the conductors of the company, and the holder permitted to ride upon it.⁶

Farewell v. Grand Trunk etc. R. Co., 15 Upper Canada C. P. 427; *Elmore v. Sands*, 54 N. Y. 512; *Barker v. Coffin*, 31 Barb. 556; *Boice v. Hudson River R. Co.*, 61 Barb. 611; *Boston etc. R. Co. v. Proctor*, 1 Allen, 267; *Shedd v. Troy etc. R. Co.*, 40 Vt. 88; *The State v. Campbell*, 32 N. J. L. 309; *Wentz v. Erie R. Co.*, 5 Thomp. & C. 556; s. c. 3 Hun, 241; *Nelson v. Long Island etc. R. Co.*, 7 Hun, 140; *Briggs v. Grand Trunk R. Co.*, 24 Upper Canada Q. B. 510. But it has been held that a ticket having the words "Good this trip only" upon its face, entitles the holder to a passage on a subsequent day as well as the day it bears date, for the reason that such words do not relate to time, but to a journey. *Pier v. Finch*, 24 Barb. 514.

¹ *Boice v. Hudson River R. Co.*, 61 Barb. 611. See also *McClure v. Phila. etc. R. Co.*, 34 Md. 532.

² *Powell v. Pittsburgh etc. R. Co.*, 25 Ohio St. 70; *Sherman v. Chicago etc. R. Co.*, 40 Iowa, 45; *Lillis v. St. Louis etc. R. Co.*, 64 Mo. 464.

³ *Terre Haute etc. R. Co. v. Fitzgerald*, 47 Ind. 79.

⁴ *Gale v. Delaware etc. R. Co.*, 7 Hun, 670.

⁵ *Wentz v. Erie R. Co.*, 5 Thomp. & C. 556; s. c. 3 Hun, 241.

⁶ *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432; *Sherman v. Chicago etc. R. Co.*, 40 Iowa, 45; *Wakefield v. South Boston R. Co.*, 117 Mass. 544; *Johnson v. Concord R. Co.*, 46 N. H. 213; *Hill v. Syracuse etc. R. Co.*, 63 N. Y. 101; *Nolan v. New York etc. R. Co.*, 9 Jones & Sp. 541; *Stone v. Chicago etc. R. Co.*, 47 Iowa, 82; *Keeley v. Boston etc. R. Co.*, 67 Me. 163; s. c. 6 Cent. L. J. 382; 17 Alb. L. J. 366. But see *Cunningham v. Grand Trunk R. Co.*, 9 Lower Canada Jur. 57.

CHAPTER IV.

OF THE OBLIGATION OF THE CARRIER TO FURNISH SAFE AND CONVENIENT STATIONS AND APPROACHES.

- LEADING CASES: 1. *Toomey v. London, Brighton, and South Coast Railway Company*.—Injuries to passengers from defects in the carrier's stations and grounds.
2. *Cornman v. Eastern Counties Railway Company*.—The same subject.
3. *Longmore v. Great Western Railway Company*.—The same subject.
4. *Nicholson v. Lancashire and Yorkshire Railway Company*.—The same subject.
5. *Crafter v. Metropolitan Railway Company*.—The same subject.
6. *McDonald v. Chicago and North-Western Railroad Company*.—The same subject.
7. *Pittsburgh, Fort Wayne, and Chicago Railroad Company v. Brigham*.—The same subject.

- NOTES: § 1. The extent of this duty.
2. To whom this duty is owed.
3. Illustrations of negligence in this particular.

1. INJURIES TO PASSENGERS FROM DEFECTS IN CARRIER'S STATIONS AND GROUNDS.

TOOMEY *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.*

English Court of Common Pleas, 1857.

The Right Hon. Sir ALEXANDER JAMES COCKBURN, Kt., *Lord Chief Justice*.

Sir CRESSWELL CRESSWELL, Kt.,

“ EDWARD VAUGHAN WILLIAMS, Kt.,

“ RICHARD BUDDEN CROWDER, Kt.,

“ JAMES SHAW WILLES, Kt.,

“ JOHN BARNARD BYLES, Kt.,

} *Justices.*

Injury to Passenger at Railway Station.—On the platform of a railway station there were two doors in close proximity to each other; the one for necessary purposes had

* Reported, 3 C. B. (N. s.) 146.

English Court of Common Pleas.

painted over it the words "For gentlemen," the other had over it the words "Lamp-room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and, having received a direction, by mistake opened the door of the "lamp-room," and fell down some steps and was injured. In an action against the railway company, it was held that, in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was no evidence of negligence on the part of the company.

THIS was an action in which the plaintiff sought to recover damages against the London, Brighton, and South Coast Railway Company for an injury sustained by the plaintiff from alleged negligence on the part of their servants.

The declaration stated that before and at the time of committing of the grievances thereafter mentioned the defendants were possessed of a public railway station, to wit, at Forest Hill, for the reception of passengers in and by the defendants' railway, for the profit and advantage of the defendants; and by the reason of the possession and use of the said railway station by the defendants for the purpose aforesaid, they ought to have kept the same in a reasonably safe and secure condition, and so as not to be dangerous to persons lawfully and properly using the same; nevertheless the defendants failed in such duty, and, by means of the mere neglect and default of the defendants in that behalf, the plaintiff, who was lawfully in and using the said station as a passenger of the defendants and with their permission and for their profit and advantage, fell through a door which the defendants there carelessly, negligently, and improperly left open and unguarded in the said station, and which was, by the neglect and default of the defendants in that behalf, dangerous to persons lawfully and properly using the same, into a deep cellar or hole, and thereby sustained divers bodily injuries and became permanently wounded in health, and disabled from following his trade of hawker or otherwise earning his living, and was put to expense, and spoiled his clothes which he had on, and lost divers of his goods and money which he had with him when he fell, and was and is otherwise injured. And the plaintiff claimed £500.

The defendants pleaded not guilty. The cause was tried before CRESSWELL, J., at the first sitting at Westminster in this term. The facts were as follows: The plaintiff, a poor and illiterate person, who carried on the employment of a hawker, went to the Forest Hill station of the London, Brighton, and South Coast Railway for the purpose of proceeding to London by the 10:30 p. m. train. Whilst waiting there, he inquired of a person on the platform, unconnected with the railway, where he should find an urinary. This person told him to go to the right.

Toomey v. London, Brighton, and South Coast Railway Company.

He did so, and found two doors, upon one of which was painted the words "For gentlemen," and upon the other the words "Lamp-room;" there being a light over the former, but none over the latter. The plaintiff, being in a hurry, and unable to read, opened the wrong door, stepped forward, and fell down some steps, breaking two of his ribs and otherwise seriously hurting himself. There was no evidence as to the description of the steps down which the plaintiff fell, nor as to the state in which the door of the lamp-room was ordinarily kept; but the plaintiff's son stated that when he went some time after the accident to look at the place, he found the door locked.

On the part of the defendants it was submitted that there was no evidence to go to the jury of negligence, and that the accident was attributable entirely to the plaintiff's own want of caution in going hastily and in the dark through a strange door.

The learned judge was of this opinion; and the plaintiff was nonsuited, with leave to move to enter a verdict for £35 (agreed damages) if the court should be of the opinion that there was evidence which ought to have been submitted to the jury.

Pigott, serjt., now moved accordingly. — The question is whether there was any evidence of negligence on the part of the company or their servants; if there was, it should have been left to the jury. Railways are constructed for the use of all classes of persons, whether literate or otherwise. Travellers of all sorts use them at all times; and the rapidity with which things are conducted at the stations leaves so little time for reflection, that it is incumbent on the companies so to order them as to prevent the possibility of an accident like this occurring. This is not an action for the breach of a common-law duty, but an action of tort founded on contract, as was said by MAULE, J., in *Martin v. Great Northern Railway Company*,¹ where an action was held to lie against the defendants for insufficiently lighting a station, whereby the plaintiff, in running across the railway to get to a train, fell over a switch-handle and was injured. [WILLIAMS, J. — If the plaintiff had taken ordinary care, the accident would not have happened. He should not have gone so hastily through a strange door.] He could not expect a door in such a situation to lead him to any danger. The door should have been kept locked. Suppose it had been made to open inwards, and a person leaning against it fell through, would it be any answer on the part of the company to say that the door

English Court of Common Pleas.

was not intended for people to lean against? In *Taylor on Evidence*¹ it is said: "Questions of *reasonable skill or care, due diligence, and gross negligence* must, in the great majority of instances, be determined by the jury, since the judges can rarely have materials which will enable them to decide such questions by rules of law. Thus, if an action be brought against a surgeon for negligence in the treatment of his patient,—per TAUNTON, J., in *Doorman v. Jenkins*,²—or against a gratuitous bailee for gross carelessness in losing the property intrusted to his care,³ what law can possibly define whether such and such conduct amounts to sufficient negligence on the part of the defendant to entitle the plaintiff to a verdict? In these and the like cases, therefore, the question has usually been left entirely to the jury; and even when they have found a verdict in opposition to the opinion of the presiding judge, the court has generally refused to grant a new trial." This is not like the case of negligence on the part of an attorney, which is a mixed question of law and fact.

WILLIAMS, J.⁴—I am of the opinion that there should be no rule in this case. I think there was no evidence of negligence on the part of the company or their servants which ought to have been submitted to the jury. It is not enough to say that there was *some* evidence; for every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence. All that appeared was, that the plaintiff inquired of a stranger the way to the urinal, and being told to go in a particular direction where there were two doors, unfortunately opened the wrong one, and through his own carelessness fell down some steps. If there had been any evidence to show that these steps were more than ordinarily dangerous, that possibly might have led to a different conclusion. But all that appears is that the door in question led down some steps into a room which was used for the purposes of the company and not for the convenience of the public. I cannot say that there was such evidence of negligence in the defendants as the learned judge was bound to leave to the jury.

¹ Vol. 1 (2d ed.), p. 44, § 31.

² 2 Ad. & E. 261; s. c. 4 Nev. & M. 174.

³ *Ibid.*

⁴ Cockburn, C. J., and Crowder, J., being shareholders in the company, declined to take part in the discussion.

 Cornman v. Eastern Counties Railway Company.

WILLES, J. — I am entirely of the same opinion. In order to establish a case of negligence against the defendants, it was incumbent on the plaintiff to prove some fact which was more consistent with negligence than with the absence of it. There was nothing of the sort proved here. There was nothing to show that the door and the steps beyond were more than ordinarily dangerous; and it was necessary and proper that something of the sort should be there for the convenient use of the station by the company. It would be difficult so to arrange every part of a station as to render it impossible for careless persons to meet with injury. I think the plaintiff failed to make out that he sustained the injury complained of through any negligence of the company or their servants.

Rule refused.

 2. THE SAME SUBJECT.

CORNMAN v. EASTERN COUNTIES RAILWAY COMPANY.*

English Court of Exchequer, 1859.

The Right Hon. Sir FREDERICK POLLOCK, Kt., *Chief Baron.*

Sir SAMUEL MARTIN, Kt.,

“ GEORGE WILLIAM WILSHERE BRAMWELL, Kt.,

“ WILLIAM HENRY WATSON, Kt.,

“ WILLIAM FRY CHANNELL, Kt.,

} *Barons.*

Injury to Passenger from Weighing-Machine on Platform. — The defendants, a railway company, had on their platform, standing against a pillar which passengers passed in going to and coming from the train, a portable weighing-machine which was used for weighing passengers' luggage, and the foot of which was elevated about six inches above the level of the platform. It was unfenced, and had stood in the same position, without any accident having occurred to persons passing it, for about five years. The plaintiff, being at the station on Christmas Day inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it, and fell over it. It was held that there was no evidence of negligence to go to the jury on the part of the company, the machine being in a situation in which it might have been seen, and the accident not being shown to be one which could have been reasonably anticipated.

DECLARATION: That the defendants, at the time of the grievances, were the owners of a railway on which they were used and accustomed to carry passengers and parcels for hire, and were also possessed of

* Reported, 4 Hurl. & N. 781.

English Court of Exchequer.

railway station, and platform abutting on the railway, upon, along, and over which all persons lawfully being at the said station were used and accustomed and were authorized by the defendants to pass and repass; and whereas at the time of the committing of the grievances the plaintiff was expecting and about to receive a parcel then carried by a certain train by the defendants at their request for reward, and to receive which parcel the defendants had authorized the plaintiff to go and pass and repass upon, along, and on the said platform, the same then being the regular, usual, and accustomed way for him to go and pass and repass for the purpose aforesaid, of which the defendants had notice, nevertheless the defendants carelessly, negligently, and improperly then suffered and permitted a weighing-machine to be and remain upon the said platform, in an unreasonable and improper place and a place that was highly dangerous to persons going, passing, and repassing upon, along, and on the platform in case the same should be greatly crowded with persons, and suffered the platform to be greatly crowded without taking reasonable means of preventing accidents, by means whereof the plaintiff, whilst he was upon the said platform with the consent of the defendants, was on account of the defendants' careless and negligent conduct and want of due precautions cast and thrown on the weighing-machine, etc.

Plea, not guilty.

At the trial before CHANNELL, B., at the London Sittings in Trinity Term, the plaintiff proved that on the 25th of December, 1858, he went to the luggage counter at the arrival platform of the defendants' railway to get a parcel, and while he was standing there a train arrived; the passengers from the train, who were very numerous, pressed him forward, and he was driven against a weighing-machine on the platform, which he did not see; his foot caught the corner of the machine; he fell and broke his knee-cap. The machine stood against a pillar; he would not have fallen had the machine not been there. It was proved that when there were large numbers of passengers they passed on each side of the weighing-machine. A witness stated that at the Great Northern, North-Western, Great Western, South-Eastern, and South-Western Railway stations the weighing-machines are flush with the floor. At the Great Western station they are enclosed by railings. The weighing-machine, which was used for weighing passengers' luggage, had been in the same situation for five years. It was a portable machine, which is convenient for weighing passengers' goods. A model was produced showing that the foot on which goods were placed for

Cornman v. Eastern Counties Railway Company.

the purpose of being weighed was six or eight inches above the level of the floor of the platform.

The learned judge told the jury that the weighing-machine was a thing which any person on the platform might have an opportunity of seeing, and therefore that the case did not resemble that of an accident from falling into an unfenced hole; that one company was not bound to adopt all the arrangements of another; and he asked them whether or not they thought that the machine was so constructed and in such a position as that, without any negligence of persons coming on the platform, accidents might occur. The jury found a verdict for the plaintiff. Leave was reserved to the defendants to move to enter a nonsuit if the court should be of opinion that there was no evidence to go to the jury.

Ballantine, Serjt., having obtained a rule *nisi* accordingly, —

Parry, Serjt., and *H. James* now showed cause. — Upon the pleadings, it must be taken that the plaintiff was lawfully on the platform with the consent of the defendants. It was negligence in the company to place a weighing-machine in such a position that persons on the platform are liable to sustain injury by being driven against it by the pressure of great crowds, such as might naturally be expected to congregate in such a place at certain times. The verdict of the jury shows that the plaintiff did not contribute to the accident by any negligence of his own. [BRAMWELL, B. — In a case against the South-Eastern Railway Company, tried before me, in which my brother *Hill* was counsel for the company, two flaps on the platform had been imperfectly turned back; the plaintiff, passing along the platform, tripped, and fell in. I suggested that there was no defence; he was so entirely of that opinion that he submitted to a verdict.] If a dangerous bridge fall in, it would be no answer to an action for negligence against the person who put it up that ninety-nine persons had previously passed over it, if it gave way with the hundredth. In *Martin v. Great Northern Railway Company*,¹ the plaintiff, in running along the platform of the railway to get into the train, fell over a switch-handle; it was held that there was evidence of negligence on the part of the defendants. The plaintiff there was on a part of the platform where he ought not to have gone. [BRAMWELL, B. — That case will not help this plaintiff, because there was evidence that there was not light enough to enable a person unacquainted with the premises to move about in safety. WATSON, B. — I have always thought that decision wrong, but perhaps it may be supported

¹ 16 C. B. 179.

English Court of Exchequer.

on that ground.] In *Southcote v. Stanley*,¹ the distinction between : visitor and a person invited as a customer into a shop, or a passenger to a railway station, was adverted to; but it was said that a person in the house of another, either as a visitor or on business, has a right that the owner of the house shall take reasonable care to protect him from injury; for instance, that he shall not allow a trap-door to be open through which the visitor may fall. The public in general know that the platform is above the rails; therefore they would be on their guard against falling off the platform. The real question is whether the property of the defendants was so arranged as to be likely to produce danger to a person situated as the plaintiff was. [BRAMWELL, B.—In a case in which I was counsel, the plaintiff came to a shop to measure a picture for a frame, and followed the defendant over a counter. He dropped through a sky-light. There was a verdict for the plaintiff, and a rule to enter a nonsuit was refused. The difficulty here is that the company could not have reasonably anticipated the sort of accident which happened. The weighing-machine had been in the same situation for years without causing any accident to any one.] That was a question for the jury. They referred also to *Barnes v. Ward*,² and *Toomey v. London, Brighton, and South Coast Railway Company*.³

Ballantine, Serjt., and *Holland* appeared in support of the rule, but were not called on.

MARTIN, B. — The rule must be absolute. We are all of the opinion that there was no evidence of negligence to go to the jury. The railway company had a station which they had used for a long time. They had placed on the platform a weighing-machine for the purpose of weighing luggage carried by the trains. It was a large machine which any one might see. The plaintiff, on Christmas Day of last year, went to the place where it was, and fell over it. There is an averment in the declaration that he was *lawfully* there; but the accident happened either from his being pressed upon by other people, or by his own misfortune. There is no evidence of any negligence on the part of the company. No doubt if there had been an open place on the platform through which any one might have fallen without perceiving it, that would have been negligence on the part of the company. Here, however, the platform was in the same condition in which it had been for five years. The accident was one of those misfortunes which will occasionally occur, and of which people must bear the consequences. If the accident had occurred in a timber-yard, or in any other place than in the

¹ 1 Hurl. & N. 247.² 9 C. B. 392.³ 3 C. B. (N. S.) 146, *ante*, p. 72.

Cornman v. Eastern Counties Railway Company.

station of a railway company, no one would have thought of bringing an action.

BRAMWELL, B. — I have felt considerable doubt whether the rule should be made absolute, not from any want of inclination to take care that railway companies should be fairly treated, but because I think that all the ingredients to make out a case of negligence against the company exist except that proof is wanting that the mischief which happened was one which could have been foreseen. In such a case, it is always a question whether the mischief could have been reasonably foreseen. Nothing is so easy as to be wise after the event. But here no witness stated that he would have known that the position of the weighing-machine was likely to cause danger. I adopt the rule stated by WILLIAMS, J., in *Toomey v. London, Brighton, and South Coast Railway Company*: "It is not enough to say that there was some evidence; a scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence on which they might reasonably and properly conclude that there was negligence." Here the evidence was that the company might reasonably have anticipated that no mischief could occur, since no mischief had resulted from keeping the machine in the position in which it stood for so long a period.

WATSON, B. — It is necessary for a railway company to have a weighing-machine. In the present case, this machine was close up to the side of the railway, quite out of the course of the transit of passengers from the carriages to the outlet from the station. It may be that on this particular occasion, in consequence of the great number of passengers, the plaintiff was driven against the machine; if so, the cause of the accident was the pressure of the crowd. If there was a pitfall in the direct road, or close to the road, the cases cited might have applied.

CHANNELL, B. — I agree that the rule must be made absolute. At the conclusion of the plaintiff's case, my brother *Ballantine* objected that there was no evidence; I was of that opinion; but as it is often a most difficult question whether there is not a scintilla of evidence which ought to go to the jury, I refused to withdraw it from their consideration. Some of the cases put in the argument have no bearing on the question. If the accident had happened from the platform being so constructed as to be insufficient to carry the weight of the persons who might come in great numbers on a particular day, that, no doubt, would have been evidence of negligence on the part of the company.

Rule absolute.

English Court of Common Pleas.

3. THE SAME SUBJECT.

LONGMORE *v.* GREAT WESTERN RAILWAY COMPANY.**English Court of Common Pleas, 1865.*The Right Hon. Sir WILLIAM ERLE, Kt., *Lord Chief Justice.*

Sir EDWARD VAUGHAN WILLIAMS, Kt.,

“ JAMES SHAW WILLES, Kt.,

“ JOHN BARNARD BYLES, Kt.,

“ HENRY SINGER KEATING, Kt.,

“ MONTAGUE EDWARD SMITH, Kt.,

Justices.

Death of Passenger from Defective Bridge at Railway Station.—A railway company, for the more convenient access of passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous. It was held that the company were liable for the death of a passenger through the faulty construction of this bridge, although there was a safer one about one hundred yards further around, which the deceased might have used.

THIS was an action brought by the plaintiff as administratrix of her deceased husband, against the Great Western Railway Company, to recover compensation for his loss, which was alleged to have occurred through the improper construction of a bridge belonging to the defendants.

The cause was tried before KEATING, J., at the last Spring Assizes at Stafford. The facts proved were as follows: The deceased, who was about sixty years of age, whilst on his way to the booking-office at a small station on the defendants' railway between Birmingham and Wolverhampton, in crossing a wooden bridge erected by the company for the convenience of passengers wishing to go from one side to the other, fell through what was described in the declaration as a “dangerous aperture” on to the platform below, and was killed. At the place through which the deceased fell there was a descent of eight or ten steps, between which and the hand-rail at the side was an opening of seven feet three inches by four feet two inches without any protection. Two witnesses called on the part of the plaintiff stated that in their opinion the bridge was extremely dangerous.

For the defendants, it was proved that the bridge in question had been erected about ten years; that it was a clear moonlight night when the accident happened; that the steps were in perfect repair, and that, though many thousand persons had passed over the bridge (and the

* Reported, 19 C. B. (N. S.) 183.

 Longmore v. Great Western Railway Company.

deceased himself many times), no casualty had ever before happened there. It was also proved that there was another bridge over which the deceased might have gone if so minded, but which was about one hundred yards further around. And it was submitted that there was no evidence to go to the jury of negligence on the part of the company; that the company were not bound to provide a bridge more than ordinarily safe; and that if the public chose to avail themselves of the shorter cut, they must take the bridge as they find it.

The learned judge left it to the jury to say whether or not the company had been guilty of negligence in providing a bridge for the use of the public that was not reasonably safe.

The jury returned a verdict for the plaintiff; damages, £500.

Cooke, Q. C., pursuant to leave reserved to him, in Easter Term last obtained a rule *nisi* to enter a nonsuit, on the ground that there was no evidence of negligence to go to the jury; or for a new trial, on the ground that the learned judge ought to have directed the jury that the defendants were not liable, there being another bridge crossing the railway, and that the deceased used the wooden bridge at his own risk. He referred to *Bolch v. Smith*.¹

Huddleston, Q. C., and *Macnamara*, now showed cause. — There was abundant evidence of negligence to go to the jury, and (if it were necessary so to contend) to warrant the verdict. The deceased was going to the booking-office by a mode of access provided for the public by the defendants. It was their duty to see that it was safe. Two witnesses proved that it was dangerous; and the result justified their opinion. [WILLES, J. — The Privy Council in one case held that the occurrence of an accident was *primâ facie* evidence of negligence;² but that is inconsistent with some other authorities.] There was no pretence for saying that the deceased by his own carelessness contributed to the accident; nor did the fact of there being another and a safer bridge a hundred yards off absolve the company from the duty of making the bridge in question safe. It may be that if a way be dedicated to the public with a dangerous structure on it, the public must take it with the danger.³ But if a railway company for their own convenience choose to construct a bridge to connect the two platforms of a station, and invite the public to use it, they are responsible if it turns out to be unsafe. It is to be remembered that this bridge is to be used, not by the active and robust only, but also by children and by the old and infirm. In the case referred to at the trial,⁴ there was no duty.

¹ 7 Hurl. & N. 736.

² *Great Western R. Co. v. Braid*, and the same v. *Fawcett*, 1 Moo. P. C. (N. S.) 101.

³ See *Robbins v. Jones*, 15 C. B. (N. S.) 221.

⁴ *Bolch v. Smith*, *supra*.

English Court of Common Pleas.

Cooke, Q. C., and H. James, in support of the rule. — To render the company liable, there must be some evidence of negligence on the part of their servants, — some failure to perform a legal duty. They are not responsible for an extraordinary and unforeseen accident at a spot which has been safely traversed for years by thousands. If the company ought to have known that the want of an additional rail made this bridge peculiarly dangerous, so ought the deceased, who was proved to have passed over it many times. The case is in this respect very like that of *Toomey v. London, Brighton, and South Coast Railway Company*.¹ On the platform of a railway station there were two doors in close proximity to each other; the one, for necessary purposes, had painted over it the words "For gentlemen," the other had over it the words "Lamp-room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and, having received a direction, by mistake opened the door of the "lamp-room," and fell down some steps and was injured. In an action against the railway company, it was held that, in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was *no evidence* of negligence on the part of the company. In using a way like this, some caution is necessary on the part of the public. In *Bolch v. Smith*,² the workmen in a government dock-yard were permitted to use certain water-closets erected for their accommodation, and for that purpose to use certain paths across the dock-yard. The defendant, a government contractor, was permitted to erect in the dock-yard certain machinery for the purpose of his work. He erected across a path which led to one of the water-closets a revolving shaft, partly covered with planks. The plaintiff, a workman in the dock-yard, having gone along this path to the water-closet, on his return stumbled, and, on putting out his hand to save himself, his arm was caught by the shaft and lacerated. There was another path along which he might have gone, but the one he used was the more convenient. It was held that the defendant was not liable for the injury, since he was under no obligation to fence the shaft, and the defect in the fencing was apparent. In *Cornman v. Eastern Counties Railway Company*,³ the defendant, a railway company, had on their platform, standing against a pillar which passengers passed in going to and coming from the trains, a portable weighing-machine, which was used for weighing passengers' luggage, and the foot of which projected about six inches above the level of the platform. It was unfenced, and

¹ 3 C. B. (N. S.) 146, *ante*, p. 72.² 7 Hurl. & N. 736.³ 4 Hurl. & N. 781, *ante*, p. 76.

Longmore v. Great Western Railway Company.

had stood in the same position, without any accident having occurred to persons passing it, for about five years. The plaintiff, being at the station on Christmas Day inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it, and fell over it. It was held that there was no evidence of negligence on the part of the company to go to the jury, the machine being in a situation in which it might have been seen, and the accident not being shown to be one which could have been reasonably anticipated. BRAMWELL, B., in delivering judgment, says: "In such a case, it is always a question whether the mischief could have been reasonably foreseen. *Nothing is so easy as to be wise after the event.* But here no witness stated that he would have known that the position of the weighing-machine was likely to cause danger. I adopt the rule stated by WILLIAMS, J., in *Toomey v. London, Brighton, and South Coast Railway Company*: 'It is not enough to say that there was *some* evidence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence on which they might reasonably and properly conclude that there was negligence.' Here, the evidence was that the company might reasonably have anticipated that no mischief could occur, since no mischief had resulted from keeping the machine in the position in which it stood for so long a period." Here, the bridge had been erected ten years, and no accident had happened there. In *Marfell v. South Wales Railway Company*,¹ ERLE, C. J., says: "The undefined latitude of meaning in which the word 'negligence' has been used appears to me to have introduced the evil of uncertain law to a pernicious extent; and I think it essential to ascertain that there was a legal duty, and a breach thereof, before a party is made liable by reason of negligence." The evidence here showed that the accident was one of an extraordinary and unforeseen nature.

ERLE, C. J.—I think this rule should be discharged. The question seems to me to have been one peculiarly for the jury, viz., whether the defendants exercised reasonable care and skill in the construction of this bridge which passengers going by their railway were invited to use. The evidence given on the part of the plaintiff was that it was not constructed with reasonable skill; and I think the judge clearly would not have been justified in taking upon himself, as a matter of law, to determine as to the propriety of its construction, and withdraw that question from the jury. There being, then, evidence for the jury, and

English Court of Exchequer.

it being within their province to decide upon it, and they having done so, and having also found the deceased himself did nothing to contribute to the accident, I think we ought not to disturb their verdict.

WILLES, J. — I am of the same opinion.

BYLES, J. — I also am of opinion that this rule should be discharged. I was struck at first by the observation of Mr. *James*; but the fact is, that the defect itself, as we now see, is not obvious to any one who looks at the bridge; and further than that, the danger from the defect, even if the defect *were* obvious, would not be apparent; and that being so, and the bridge being a nearer mode of access to the railway from the house from which the deceased came, he was invited by the company to pass over the bridge, which had a defect in it which was not obvious, and the danger from which was not apparent. In addition to that, it is to be recollected that the jury have negatived all carelessness on the part of the deceased. The simple question is, Was this an improper structure? The plaintiff's witnesses stated that it was; and they stood uncontradicted, and their judgment is sustained by the event. It was purely a question for the jury.

KEATING, J. — I am of the same opinion. No doubt the jury might, if so minded, have found that there was no negligence on the part of the company. And it certainly seemed to me that there was a very strong case for the company. If I had been upon the jury, I do not say I should have found the same way, though I do not at all mean to intimate an opinion that they should not have found as they did.

Rule discharged.

4. THE SAME SUBJECT.

NICHOLSON *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.*

In the English Court of Exchequer, 1865.

The Right Hon. Sir FREDERICK POLLOCK, Kt., *Chief Baron.*

Sir SAMUEL MARTIN, Kt.,

“ GEORGE WILLIAM WILSHIRE BRAMWELL, Kt.,

“ WILLIAM FRY CHANNELL, Kt.,

“ GILLERY PIGOTT, Kt.,

} *Barons.*

Egress from Railway Train obstructed, injuring Passenger. — The plaintiff, a passenger by the defendants' railway, was set down at a station after dark, on the

* Reported, 3 Hurl. & Colt. 534.

Nicholson v. Lancashire and Yorkshire Railway Company.

side of the line opposite to the station and place of egress. The train was detained more than ten minutes at this place, and from its length blocked up the ordinary crossing to the station, which is on the level. The ticket-collector stood near the crossing with a light, telling the passengers, as they delivered their tickets, to "pass on." The plaintiff passed down the train to cross behind it, and from the want of light stumbled over some hampers put out of the train, and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railway company. These facts were held to be evidence for the jury of negligence on the part of the company.

THE declaration stated that at the time of the committing of the grievances hereinafter mentioned the defendants were carriers of passengers for hire from Wakefield to Thornhill Lees, in carriages on a railway, and used a certain station at Thornhill Lees aforesaid for the use and accommodation of their said passengers there, and the said station was then in possession and under the management of the defendants for the purposes aforesaid. Yet the defendants negligently managed the said station and carriages, and omitted to light the said station in a proper and sufficient manner for the use and accommodation of their said passengers there, and to provide proper and sufficient accommodation for their said passengers to depart safely from the said carriages on their arrival at the said station; and negligently left hampers in the way of their said passengers departing from the said carriages at the said station, whereby the plaintiff, having been received and carried by the defendants as a passenger in the said carriages on the said railway from Wakefield aforesaid to Thornhill Lees aforesaid, and being in the act, on his arrival at the said last mentioned place, of departing from the said carriages at the said station, fell over the said hampers, and was thrown down, etc.

Plea, not guilty. Issue thereon.

At the trial before BLACKBURN, J., at the West Riding of Yorkshire Summer Assizes, 1864, the following facts appeared: Thornhill Lees is a station on the defendants' line of railway, the buildings of the station and the principal platform being on the north side of the line. On the south side there is also a raised platform formed out of the embankment; but to enable a passenger set down there to quit the line, it is necessary that he should cross to the north side. The west end of the north platform is opposite the east end of the south platform, and between these points the railway company provide a crossing on the level. Trains arriving from Wakefield and other places east of Thornhill Lees deposit their passengers at the south platform. The plaintiff arrived at Thornhill Lees from Wakefield by one of the defendants' trains, and was set down after dark on the south platform. The train remained there for ten minutes or a quarter of an hour, the carriages at

English Court of Common Pleas.

the back of the train meanwhile, owing to its length, blocking up the crossing to the north platform, and extending some distance behind the crossing. The ticket-collector stood to collect the tickets at the east end of the south platform, with a light, telling the passengers, as they gave up their tickets, to "pass on." The plaintiff gave up his ticket, and passed down the train with the intention of crossing behind it, but in the darkness stumbled over a hamper that had been put out of the train, and sustained the injuries for which this action was brought. Evidence was also given that it had been the constant practice of passengers, when the ordinary crossing was blocked by the length of their train, to pass down and cross behind it, and that this practice had never been interfered with on the part of the railway company.

Overend, in last Michaelmas Term, obtained a rule *nisi* to enter a nonsuit, upon the ground that there was no evidence for the jury of the defendants' negligence; against which —

Manisty and *Kemplay* showed cause, contending that the facts above detailed amounted to an invitation on the part of the railway company to the plaintiff to go where he did for the purpose of crossing behind the train, and that under these circumstances there was evidence that the mischief was caused by the railroad company's negligence.

Overend and *Maule*, in support of the rule, contended that the mere circumstance that the railway company on previous occasions had not *prevented* passengers from crossing behind the train was no evidence that they had sanctioned that practice; and inasmuch as a regular way was provided by the railway company where the line might be crossed, passengers who for their own convenience chose to substitute another way must take the substituted way with all its incidents. They cited *Cornman v. Eastern Counties Railway Company*,¹ and *Wilkinson v. Fairrie*,² relying on the latter case as closely resembling the present case in its facts.

POLLOCK, C. B., now said. — This was a case tried at Leeds, before my brother BLACKBURN, when the jury found a verdict for the plaintiff, the learned judge reserving to the defendants leave to move to enter a nonsuit if the court should think there was no evidence of the defendants' negligence, the defendants not to appeal without the leave of the court.

The accident appears to have happened as follows: When the train in which the plaintiff was a passenger arrived at Thornhill Lees, the train, owing to its length, blocked up that part of the line where the

¹ 4 Hurl. & N. 781, *ante*, p. 76.

² 1 Hurl. & Colt. 633.

 Crafter v. Metropolitan Railway Company.

railway company provide a level crossing for passengers to cross the principal platform and so reach the place of egress from the station. In that position the train remained for ten minutes or a quarter of an hour. As this had happened before, passengers on being set down had acquired the habit of walking along the line and crossing behind the train. Evidence was given that on this occasion when the passengers reached the crossing, which was blocked by the train, their tickets were taken and they were told by the ticket-collector to "go on;" and certainly there was no way of going on except by going along the train and going round behind it. The plaintiff went on, and, there being no light, stumbled over a hamper which had been put out of the train, and sustained considerable injury. Under these circumstances, we are all of opinion that there was evidence of negligence for the jury.

I own it appears to me to be *some* evidence of negligence if for ten minutes or a quarter of an hour after a train has arrived and set down its passengers there is an obstacle to impede those passengers from reaching the platform. And for mischief thence arising, and not attributable to the plaintiff's negligence, I think the defendants are responsible. The court all think the facts of this case disclose evidence of negligence; consequently the rule to enter a nonsuit must be discharged.

Rule discharged.

 5. THE SAME SUBJECT.

CRAFTER v. METROPOLITAN RAILWAY COMPANY.*

English Court of Common Pleas, 1866.

The Right Hon. Sir WILLIAM ERLE, Kt., *Lord Chief Justice.*

Sir JAMES SHAW WILLES, Kt.,

" JOHN BARNARD BYLES, Kt.,

" HENRY SINGER KEATING, Kt.,

" MONTAGUE EDWARD SMITH, Kt.,

} *Justices.*

Passenger injured upon Slippery Staircase at Railway Station.—The staircase leading from a railway station to a highway (being otherwise unobjectionable) had at the edge of each step a strip of brass, which originally had been roughened, but which had from constant use become worn and slippery. The staircase was about six feet wide, and had a wall on each side, but no hand-rail. The plaintiff (a passenger by the railway, who was a frequent traveller by the line), in ascending the station, slipped and fell upon the stairs, and was much hurt. In an action charging the company with

* Reported, L. R. 1 C. P. 300.

English Court of Common Pleas.

negligence in not providing a reasonably safe and convenient staircase, two witnesses for the plaintiff stated that in their opinion the staircase was unsafe, one of them (a builder) suggesting that brass nosings on the steps was improper, and that lead would have been better, because less slippery, and that there should have been a hand-rail. This was held to be no evidence of negligence to go to the jury.

THIS was an action against a railway company for alleged negligence.

The second count stated that the defendants were carriers of passengers for hire on their railway, and used a certain station for the reception and accommodation of the passengers thereon; that the station was in their possession and under their management; and that they negligently managed the said station, and kept the staircases and approaches thereto in a dangerous and slippery state, and did not provide hand-rails or sufficient accommodation for safe access to the carriages; and that the plaintiff, having been received by them as a passenger, fell and was thrown down the staircase and was injured, etc.

Plea, not guilty.

The cause was tried before ERLE, C. J., at the sittings at Westminster after last Michaelmas Term, when the following facts appeared in evidence: On the 28th of July, 1864, the plaintiff, who was a passenger by the defendants' railway from Farringdon Street to King's Cross, ascending the stairs at the King's Cross station to get to the highway, slipped and fell and was considerably injured. The cause of his slipping was that a strip of brass which was placed at the edge of each step had by constant traffic been worn smooth. Two witnesses who were called on the part of the plaintiff, one of whom was a builder, stated that in their opinion the staircase was a dangerous one, as well by reason of the nosings of brass as from the absence of a hand-rail. No witnesses were called on behalf of the defendants to contradict this; but it was proved that about forty-three thousand persons had passed up the staircase in question during each month since the station had been opened in 1863, and that no accident had ever happened there. It was also proved that the plaintiff was in the constant habit of travelling by the line, getting out at the same station.

It was contended on the part of the defendants that there was no evidence to go to the jury of any actionable negligence or the omission of any legal duty on their part.

His lordship declined to nonsuit the plaintiff, but reserved leave to the defendants to move; and he left it to the jury to say whether or not the staircase afforded reasonable accommodation to the public.

The jury returned a verdict for the plaintiff, damages £105.

Hawkins, Q. C., on a former day in this term, obtained a rule *nisi* to enter a verdict for the defendants or a nonsuit, on the grounds, — *first*,

Crafter v. Metropolitan Railway Company.

that there was no proof of any such negligence as alleged; *secondly*, that there was no evidence to justify the finding of the jury; or for a new trial, on the ground that the verdict was against evidence.

Huddleston, Q. C., and *H. James*, showed cause. — The only question is whether there was any evidence of negligence which the learned judge was warranted in leaving to the jury; if there was, the matter is disposed of by their finding that the company had not provided reasonably sufficient accommodation for the public. Two witnesses were called on behalf of the plaintiff, one of whom was a builder, and both stated that they considered the staircase in question to be a dangerous one. The defendants called no witnesses. Under these circumstances, it can hardly be said that there was no evidence to go to the jury. The case very closely resembles *Longmore v. Great Western Railway Company*,¹ where the jury found a bridge over the railway, which had been erected ten years, and over which many thousand persons had passed safely, to be a dangerous structure, upon the opinion of two witnesses. The question was left to the jury there in almost identically the same terms as here; and the court held that it was peculiarly a matter for the jury, and refused to disturb the verdict.

Hawkins, Q. C., and *Horace Lloyd*, in support of the rule. — There clearly was no evidence of negligence to warrant the conclusion the jury came to. The stairs in question were ascending stairs, six feet wide, with a wall on each side. The traffic being very great, it was necessary for the safety of the public that the stairs should be as durable as possible. The front part of the surface therefore was protected with brass, which is not an unusual thing to find on much-used staircases. The reason why the defendants called no witnesses to prove the staircase safe was that they thought the fact of so many persons having used it without accident was abundant evidence of the absence of danger; and they had no reason to expect that any one would have the hardihood to swear that it was dangerous. The evidence to charge the defendants in a case of this sort must, as is observed by WILLIAMS, J., in *Toomey v. London, Brighton, and South Coast Railway Company*,² be “evidence upon which the jury might reasonably and properly conclude that there was negligence.” *Cornman v. Eastern Counties Railway Company*³ is also a strong authority that a railway company are not to be charged with negligence unless it is shown that they have omitted to perform some duty.

¹ 19 C. B. (N. S.) 183, *ante*, p. 81.

³ 4 Hurl. & N. 781; s. c. 29 L. J. (Exch.) 94,

² 3 C. B. (N. S.) 146; s. c. 27 L. J. (C. P.) 39, *ante*, p. 72.

English Court of Common Pleas.

ERLE, C. J. — I am of opinion that this rule should be made absolute, because I think there was no evidence to go to, the jury of any actionable negligence on the part of the defendants. There is a manifest distinction between the present case and that of *Longmore v. Great Western Railway Company*.¹ With regard to the nature of the structure, it was an ordinary staircase about six feet wide, with a wall on each side, the steps being of ordinary dimensions. There was nothing peculiarly dangerous in it, like the staircase in *Longmore's Case*. It was said that brass was an improper thing for the surface of the stairs, and that lead would be better because less slippery; but, in my judgment, that expression of opinion on the part of the witnesses affords no ground for holding the defendants liable. As to the absence of a hand-rail, I see nothing in the nature of the structure to make it the defendants' duty to provide one, though possibly it might be occasionally found convenient, — as, by a man with a wooden leg, or a very infirm person. Besides, from the width of the staircase, several persons must necessarily be going up together, and all could not avail themselves of the hand-rail, if there. Further, the plaintiff was shown to have been in the habit of using this staircase for about eighteen months, and many thousand persons have used it without any accident having happened. The mere circumstance of the want of a hand-rail and the use of brass instead of lead, does not afford a ground of action.

WILLES, J. — I am of the same opinion. It was incumbent on the plaintiff to give reasonable evidence from which the jury would be warranted in concluding that the company had not furnished sufficient accommodation for access to and from the station. The real question was whether the staircase was defective and dangerous by reason of the nosings (as they were called) of brass and the absence of a hand-rail. The only evidence as to the former was that of the witness (the builder) who said that lead would have been a safer material for the purpose, because less slippery. But we must take that evidence with the common experience which every one has. We all know that brass is a material which is commonly used for the nosing of stairs in public offices, steamboats on the river, and other places of much resort. It is to be observed also that the plaintiff himself well knew the condition of the staircase in question, having gone up it daily for about eighteen months. Taking all the circumstances together, this seems to me to be nothing more than an attempt to dictate to the company, and make them cease to use

¹ 19 C. B. (N. S.) 183, *ante*, p. 81.

Crafter v. Metropolitan Railway Company.

a particular metal on their staircases which is commonly used for the purpose and which nobody has hitherto complained of. I think there was no evidence which could properly be left to the jury to show that the company had been guilty of any negligence in the construction or maintenance of the staircase. I also think the case is very distinguishable from that of *Longmore v. Great Western Railway Company*. In that case the danger arose from the circumstance of a rail being placed at the side of some steps on the bridge, which apparently afforded protection to persons using the bridge, but which in reality afforded no protection whatever in the event of an accidental slip in ascending or descending; thus leaving a hole, which was a sort of concealed trap. Here, however, there was nothing improper or unusual in the construction of the staircase; nothing to cause danger to a person walking with ordinary circumspection. For these reasons, I think the rule should be made absolute to enter a nonsuit. That part of the rule which seeks for a new trial as for a verdict against evidence may be reserved, in order to abide any ulterior proceeding.

KEATING, J. — I have felt some difficulty in seeing how this case is to be distinguished from *Longmore v. Great Western Railway Company*, and I confess that that difficulty is not quite removed. It is, however, only a question of degree. My lord and my brother WILLES think there is a distinction, and I do not wish to dissent from their conclusion.

MONTAGUE SMITH, J. — I agree with my lord and my brother WILLES that a nonsuit should be entered. The line must be drawn in these cases between suggestions of possible precautions, and evidence of actual negligence such as ought reasonably and properly to be left to a jury. It is difficult in some cases to determine where the line is to be drawn, but here I have no hesitation in saying that there was no evidence of negligence which my lord could properly leave to the jury. There was nothing unusual in the construction of the staircase. The use of brass for protecting the edges of the stairs, and the absence of a hand-rail, which alone were relied on by the plaintiff, are by no means unusual in staircases of a similar description where the traffic is great. They were obvious to every one using the stairs, and were well known to the plaintiff himself. The plaintiff has no right to complain of the absence of accommodation of an unusual kind. The mere fact of the plaintiff having fallen and hurt himself is not sufficient to charge the company with negligence. *Longmore v. Great Western Railway Company* is obviously distinguishable. There, there was an aperture left at the side of the stairs of the bridge, which was undoubtedly dan-

Supreme Court of Iowa.

gerous; it being large enough to admit of a person accidentally slipping on the stairs falling through; and it was not an obvious danger. As to the suggestion of the witness that brass nosings were improper, and that lead would be more proper, that was a mere expression of opinion. Every case of this kind must be decided upon its own particular facts and its surrounding circumstances; and the court is in an especial manner bound to see that the evidence submitted to the jury in order to establish negligence is sufficient and proper to go to them. I am clearly of opinion that there was no sufficient or proper evidence here, and that the rule to enter a nonsuit should be made absolute.

Rule absolute.

6. THE SAME SUBJECT.

MCDONALD v. CHICAGO AND NORTH-WESTERN RAILROAD COMPANY.*

Supreme Court of Iowa, 1868.

Hon. JOHN F. DILLON, *Chief Justice.*

" CHESTER C. COLE,	} <i>Judges.</i>
" GEORGE G. WRIGHT,	
" JOSEPH M. BECK,	

1. **Railroad—Duty to provide Station Accommodations.**—There exists a common-law duty on the part of railway companies to provide reasonable accommodations at their stations for passengers who are invited and expected to travel on their roads.

2. **Rules of Company as to entering Cars.**—Railroad companies are held to a strict accountability for the safety of passengers. To enable them to properly discharge this duty, they have power to make reasonable rules and regulations respecting the time, mode, and place of entering cars; and these, *when known to the passenger*, he is bound to conform to, and he cannot violate them by pursuing another course and hold the company liable for damages thus occasioned, though the jury may believe that an ordinarily prudent man might have adopted the same course.

3. **Injury from Defective Platform—Liability of Company as Common Carriers.**—In the present case, which was an action by a husband and wife against a railway company, as common carriers, to recover damages for injuries to the wife, caused by defective steps to a platform to which the train had backed, and which was not the usual place for passengers to get on and off the cars, the jury should have been instructed to ascertain from the evidence whether the company had designated or set apart the platform in front of the depot as the place where it required all passengers to enter the cars; if so, and this was known to the plaintiffs, and they, in disregard of such requirement, in advance of time, and without any justification, sought to enter the cars at another place, and in so doing met with the injury, then the company would not be liable as common carriers. But if, on the other hand, there

* Reported, 26 Iowa, 124.

McDonald v. Chicago and North-Western Railroad Company.

was no such rule or regulation known to the plaintiffs, and they in good faith, and using reasonable care, were seeking to find and enter the cars, the company would be liable, as the plaintiffs would have a right to presume that the platform and its approaches were in a safe condition.

4. **Same Subject.**—As a general rule, railroad companies are bound to keep in a safe condition all portions of their platforms, and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platforms, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go.

APPEAL from Linn District Court.

Liability of railroad companies for safe condition of platform at stations, etc.

This was an action to recover damages for an injury received by Mrs. McDonald, at Cedar Rapids, on the evening of January 3, 1867.

The petition avers that the defendant is a common carrier of passengers; that on the third day of January, 1867, at defendant's station in Cedar Rapids, Mrs. McDonald (plaintiff) purchased a ticket entitling her to be carried from Cedar Rapids, Iowa, to Fulton, Illinois, and that "thereupon it became and was the duty of the defendant to use due and proper care that the plaintiff should be safely placed in said train, and so to construct and keep in good repair the platform around the said depot, and the steps to the same, that plaintiff could safely go from the platform to the cars;" yet the defendant neglected its duty in this behalf, "so that the plaintiff, in going from the platform to the cars, fell through a step connected therewith, which defendant had negligently left in an unsafe condition, by reason of which fall she broke her ankle-bone and was otherwise injured," etc.

Answer: 1. In denial. 2. That the injury was caused by the plaintiff's own negligence.

On the trial it appeared in evidence that the plaintiffs (husband and wife) had been on a visit to Cedar Rapids, and being desirous of going to their home in Wisconsin, procured tickets of the defendant, at its station in Cedar Rapids, and waited in the passenger-room at the station until the arrival of the train on which they expected to take passage. The train arrived at 6:20 P. M., and left at 6:45 P. M. When the train arrived, the plaintiffs went to take their seats in the cars, and when about to step upon the train heard the announcement of "twenty minutes for supper." Mr. McDonald testified, that about the time this announcement was made "the train started, and moved back beyond the platform, and I told my wife we had better go back into the room till such a time as the train should come forward. She said 'no,' she would rather sit down on the platform, or stand up there, as the room was so full of tobacco-smoke that she could not stand it. It made her sick.

Supreme Court of Iowa.

I proposed to her that we should go back to the cars and get on, as it was cold. We started, and walked on the platform toward the cars until we came to the west end of the platform, and in going down the steps, one of them being loose and out of place at one end, it gave way and came up between my legs, and threw us both on the track, head foremost, down under the train." Her right leg was broken, the left ankle sprained, and she was otherwise injured, and long confined to her bed. Mrs. McDonald testified to the same facts.

The evidence showed that the accident happened when it was "dusk, or getting dark." There was evidence tending to show care in descending the steps where the accident happened.

Mrs. McDonald was fifty-nine years old, and weighed about two hundred pounds. There was evidence showing that the passenger-depot, if not full, was crowded with foreign emigrants, who were smoking. The plaintiff (Mr. McDonald) testified that "it was thick with tobacco-smoke, so much so that it was difficult for one to breathe; and my wife took more offence at it than I did." Mrs. McDonald testified that "it was so smoky that it made me sick," and that this was the reason why she did not go back into the room, but went west along the platform to get aboard of the cars. The plaintiffs' son testified "that the depot was so full of people that his mother could not get a seat, and that it was full of tobacco-smoke, which was very offensive to her."

This testimony as to the smoky condition of the room was allowed to go to the jury against the defendant's objection.

The defendant produced evidence showing that the steps where plaintiffs fell were about three hundred feet distant from the door of the passenger depot; and that the usual place for passengers to get on and off the cars was in front of the passenger-depot, and the platform between it and the freight-depot. Passengers to and from the Dubuque and South-Western Railroad depot usually pass over these steps. It was also shown by the defendant that it was customary when the train arrived, as in this instance, from the west, to run back so as to bring the baggage and express cars to a point opposite the freight-depot, for the purpose of discharging and receiving baggage and express matter. This movement, on the evening on which the accident in question happened, placed the passenger-coaches west of the west end of the platform, so that the nearest passenger-car was about one car-length beyond the steps at the west end of the platform. It was while the cars were thus standing that the plaintiffs, without waiting for them to be drawn up to the platform in front of the passenger-depot, started for them, walking the whole length of the platform, and in descending the steps the injury

McDonald v. Chicago and North-Western Railroad Company.

for which this action is brought happened. Defendant also produced evidence to the effect "that there was plenty of room to get on and off the trains from the platform; and that there was no necessity for any one to go down these steps to get on. Before leaving, trains always draw up in front of the passenger-depot, and stop to take on passengers. The accident happened fifteen or twenty minutes before the leaving-time of the train. The steps are not intended or used for passengers to get on the trains.

The defendant asked the court to give the following instructions, viz.:

"1. If the jury believe from the evidence that the defendant, at the time of the alleged injury at the station at Cedar Rapids, was provided with a safe and suitable platform in front of and adjacent to the passenger-rooms of said station, so that passengers could safely and conveniently pass from said room to the trains, and that passenger-trains stopped at said platform for the purpose of receiving passengers, and if said plaintiffs, in attempting to get upon said train by a different and unusual way, and at a different and unusual place, met with said accident, then the plaintiffs are not entitled to recover in this action.

"2. That if the plaintiff Margaret McDonald attempted to enter said train at a place not prepared or designed by the defendant for receiving passengers on trains, there being no paramount necessity for so doing, and in making such attempt she received the said injury, then her own fault contributed to the same, and the plaintiffs cannot recover.

"3. The liability of the defendant as a common carrier did not commence as to the plaintiffs until the train which they were to take was drawn up to the usual place for receiving passengers, unless they were directed by some authorized agent of defendant to go upon the train at another and different place, or before the train reached the usual place."

* * * * *

Each of these was *refused*, and the defendant excepted.

The court, after referring to the issues made by the pleadings, charged the jury as follows:—

* * * * *

"4. The principal question for you to determine is, By whose fault or negligence did the accident occur? If one of the steps was loose and not nailed down, by reason of which the accident happened, it is such a want of care as would render the defendant liable, unless you find that the accident happened, or was contributed to, by the want of ordinary care and prudence on the part of the plaintiff Margaret McDonald.

Supreme Court of Iowa.

"5. It is for you to determine from the evidence whether the plaintiff Margaret McDonald used ordinary care and prudence in leaving the depot and going to the cars by the way and at the time she did; and by ordinary care is meant such care and prudence as an ordinarily prudent person would exercise under like circumstances.

"6. If you find that an ordinarily prudent person would not have gone down the steps of the platform where the accident occurred, but would have waited until the passenger-cars were opposite the passenger-depot, then the defendant is not liable. And if you find that the plaintiffs went by a way which was not used or travelled over by passengers to enter the cars, and that a person of ordinary prudence would not have gone by that way, you may fairly infer that there was a want of ordinary care on her part. Passengers must exercise ordinary care in approaching and entering the cars.

"7. If, however, you find that the defendant backed its train up to the place where it stood when the accident happened; that persons could conveniently and safely approach the train where it then stood but for the defective step, and there was no rule or regulation of the company prohibiting persons from approaching the cars by that way, and that an ordinarily prudent person would have approached the train by that way, the defendant is liable if the accident occurred by reason of the defective step."

The defendant excepted to this charge.

The jury returned a verdict for the plaintiffs for \$2,000. A motion for a new trial was overruled, and judgment was entered against the defendant; from which it prosecutes the present appeal.

E. S. Bailey, for the appellant; *E. Latham*, for the appellees.

DILLON, C. J., delivered the opinion of the court. — Appellant's various grounds for a reversal of the judgment we notice in the order in which they are presented by counsel. [Unimportant points omitted, and the omission indicated by asterisks.] * * *

2. There was no error in the action of the court in allowing witnesses to testify as to the condition of the passenger-room with respect to tobacco-smoke. The evidence was proper as part of the transaction out of which the injury arose, and as showing why the plaintiffs did not remain in the passenger-room, or return to it. The effect of this circumstance upon the rights of the parties was not stated to the jury. It would not justify the plaintiffs in violating a known rule of the company, if there was one, as to the particular place where passengers were required to enter their cars.

But I have no hesitation in saying that, without any statute enacting

McDonald v. Chicago and North-Western Railroad Company.

it, there is a common-law duty on these companies to provide reasonable accommodations at stations for the passengers who are invited and expected to travel on their roads.¹ If the station-room is full, or if it is intolerably offensive by reason of tobacco-smoke, so that a passenger has good reason for not remaining there, while this will not justify him in violating reasonable rules and regulations of the company, which are known to him, respecting the place, mode, and time of entering the cars, it will justify his endeavor to enter the cars at as early a period as possible, especially if it is dark and cold without, if in so doing he uses proper care and violates no rule or regulation of the company of which he has actual knowledge, or which, as a reasonable man, he would be bound to presume existed. He would not, of course, be justified by the condition of the passenger-room in rashly endeavoring to board a train in motion, or the like; but if the train had arrived, was on the track, the car doors open, and if, as is frequently if not generally the case, passengers are allowed, or at least not forbidden, to enter the cars before they are drawn up in front of the station, we think a passenger may reasonably and properly make the attempt to reach and enter the cars, if he is not aware of any rule or regulation to the contrary; and if he receives an injury in so doing (he using proper care), from the unsafe and dangerous condition of the platform or the steps in a place where passengers would naturally go, the company are liable therefor.

This subject, and some of the leading and recent decisions bearing upon it, will be alluded to in considering the instructions of the court to the jury. * * *

5. It is next insisted that the court erred in refusing to instruct as prayed by the defendant, and also in the charge of its own to the jury. The view taken by the court below will appear from the instructions refused and given, which are set out in the statement of the case and need not be here repeated.

By recurring to the court's charge in chief, it will be seen that it made the defendant's liability turn upon the question whether the step which caused the accident was loose. The jury were told in the charge that, if one of the steps was loose and not nailed down, by reason of which the accident happened, the defendant is liable unless the plaintiffs' own want of care contributed to the injury; and such want of care does not exist if the jury find that an ordinarily prudent person would have gone down the steps of the platform, and would not have waited until the passenger-cars were opposite the passenger-depot. See paragraphs 4, 5, 6, and 7 of the charge.

¹ *Caterham R. Co. v. London R. Co.*, 87 Eng. Com. Law, 410.

Supreme Court of Iowa.

These instructions assume and necessarily imply that the plaintiffs had the right to enter the cars when and where they attempted it, if an ordinarily prudent person would have pursued the course which the plaintiffs did; that is, if such persons would have gone down the steps, and not have waited for the cars to be drawn up to the platform opposite the passenger-depot.

The law on this subject is this: Railroad companies are held to a strict rule of accountability for the safety of passengers. This is salutary and right. To enable them properly to discharge this duty, they have the power to make reasonable rules and regulations. They may make such rules and regulations respecting *the time, mode, and place of entering cars*. *These, when known to the passenger*, whether they have ever been written or published, or are posted up or not, he is bound to conform to; and he cannot violate them and pursue another course, and hold the company liable for damages thus occasioned, and which would have been avoided by conforming to the rules and regulations of the company, even though the jury may believe that an ordinarily prudent person would or might have adopted the same course.

A railroad company has a right to require all passengers about to enter their cars to do so only when the cars are brought up to the platform for that purpose. We cannot say that it is a rule of law that the mere existence of a platform in front of a depot is necessarily notice to the passenger that the train will be drawn up at that place to receive him, and that the company require that he shall wait and enter the cars at that place, and is prohibited from entering them elsewhere. In many places, passengers are required or allowed by the companies to enter trains elsewhere than from the platform in front of the passenger station or depot. In many places, also, railroad companies fail to discharge a duty which they owe to the travelling public, by leaving them, without any assistance, to find out as best they can where the train is which they wish to take, how to reach and when and where to enter it. Few persons travelling in strange places and on strange roads but have experienced the embarrassment arising from the failure of the company to have sign-boards, or officers or agents in attendance, to give information of this character.¹ A company may require trains to be entered at a particular place, — as, for instance, in front of the passenger-depot. Often, however, there is no such requirement, and passengers are allowed, or at least not forbidden, to enter elsewhere.

Applying these general principles to the case in hand, we are of opinion that the instructions asked by the defendant were faulty in so

¹ See observations of Maule, J., to the jury in *Martin v. Railway Co.*, 81 Eng. Com. Law, 186, 187; s. c. 16 C. B. 179, 186.

McDonald v. Chicago and North-Western Railroad Company.

far as they assume, as a matter of law, that it is the duty of a passenger, irrespective of any knowledge on his part of any rule or regulation, to wait, before entering the cars, until the train is drawn up in front of the passenger depot or platform. If he knew that it was to be thus drawn up, and that passengers were expected and required to wait until this should be done before entering the cars, he could not, with such knowledge, be justified in seeking to enter the cars in an unusual place and at an unusual time, and hold the company for damages thus occasioned. Why? Because he is not in the line of his duty and in the exercise of his lawful rights at the time. If the plaintiffs attempted to enter the cars at a place which they knew, or from the nature of the circumstances surrounding them ought to have known, was not prepared or designed for receiving passengers, and at which they knew, or from the circumstances ought to have known, the company did not allow passengers to enter, the company would not be liable as *common carriers* upon their contract, — however it might be if they had not been declared against in this capacity, — for an injury happening in the prosecution of such an attempt. Why? The answer is, that, in making such an attempt, the plaintiffs would not be in the line of their duty, or in the exercise of any right conferred upon them by their contract with the company.

Applying the general principles before expressed to the charge of the court, and it is obvious that the minds of the jury were not directed to the proper grounds on which the defendant's liability or non-liability would depend. The jury should have been directed to ascertain from the evidence whether the railroad company had designated or set apart the platform as the place where it required all passengers to enter the cars. If so, and this was known to the plaintiffs, and they, in disregard of such requirement, and in advance of time, and without justification for so doing, sought to enter the cars at another place, and in so doing the wife met with the injury for which she sues, the company is not liable in this action as common carriers; and this is the capacity in which it is sued. If, on the other hand, there was no rule or regulation known to the plaintiffs requiring them to enter at the platform, and they, in good faith, and using reasonable care, were seeking to find and enter the cars, the defendant would be liable for an injury caused by the defective platform, or steps leading to it; since the plaintiffs — it being dark, or nearly so — would have a right to presume that the platform and its approaches were in a safe condition.

We will not undertake to lay down any rule applicable to the ever varied circumstances of all cases which may arise. The gist of such an action as the present, if no known rule or regulation of the com-

 Supreme Court of Ohio.

pany, reasonable in its character, has been violated, is negligence; and what constitutes negligence so as to give an action, it is impossible to define in a rule which shall comprehend all cases.

The recent adjudications in the cases below cited have been carefully examined, and they warrant us in laying down the general principles before expressed. Upon reason, that is, enlightened common sense, applied to the relation which railway companies sustain to the public, and applied to the nature of man and the mode in which the business of carrying passengers is practically and usually transacted, and upon the authority of decided cases, we are justified in laying down the following general rule as to the duty of such companies, to wit: that they are bound to keep in a safe condition all portions of their platforms, and approaches thereto, to which the public do or would naturally resort, and all portions of their station-grounds reasonably near to the platforms, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go.¹

For the error before mentioned in the instructions of the court, the judgment is reversed, and the cause remanded for a new trial in accordance with the rules and principles of law herein expressed.

 7. THE SAME SUBJECT.

 PITTSBURGH, FORT WAYNE, AND CHICAGO RAILWAY COMPANY
v. BRIGHAM.*

Supreme Court of Ohio, 1876.

Hon. JOHN WELCH, *Chief Justice.*

“ WILLIAM WHITE,	} <i>Judges.</i>
“ GEORGE REX,	
“ W. J. GILMORE,	
“ GEORGE W. MCILVAINE,	

Railway Station—House blown down by a Storm.—A railroad company is not liable for injuries occasioned by its buildings or structures being blown down by

* Reported, 29 Ohio St. 374.

¹ *Burgess v. Railway Co.* (unfenced hole in station-ground near depot building), 95 Eng. Com. Law, 923 (1853); *Martin v. Railway Co.* (defective light in station grounds, where passengers would naturally go), 81 Eng. Com. Law, 179 (1855); *Cornman v. Railway Co.*, 4 Hurl. & N. 781 (1859); remarks of *Martin, B.*, and *Watson, B.*, as to open place

in platform; *Crafter v. Railway Co.*, 12 Jur. (N. S.) 272; *s. c.* L. R. 1 C. P. 300 (1866); *Longmore v. Railway Co.*, 19 C. B. (N. S.) 183; *s. c.* 115 Eng. Com. Law, 183 (1865); *Sawyer v. Railway Co.*, 27 Vt. 377; *Murch v. Railroad Co.*, 29 N. H. 9, 39, 40, remarks of *Bell, J.*; *Frost v. Railroad Co.*, 10 Allen, 357 (1865).

Pittsburgh, Fort Wayne, and Chicago Railway Company v. Brigham.

storms, where it has used that care and skill in their structure and maintenance which men of ordinary prudence and skill usually employ; and it is error in such cases to charge the jury that the company is "bound to guard against all storms which can reasonably be anticipated."

ERROR to the District Court of Stark County.

On the 5th of December, 1870, a violent storm blew down part of the roof of the Massillon station-house belonging to the Pittsburgh, Fort Wayne, and Chicago Railway Company, and Brigham was seriously injured by the falling materials. At the time of the occurrence the Pennsylvania Railroad Company was operating the road and using the building, as lessee under the first-named company. Under the statute which makes the lessor company equally liable with the lessee for injuries occasioned in using and operating the road, Brigham brought his action against both companies, charging the lessor company with negligence in not constructing and securing the roof of the building in a proper and substantial manner, and the lessee company with negligence in maintaining and using it in its insecure condition. The negligence was denied by both companies, and the cause was tried to a jury, who returned a verdict for the plaintiff. A motion for a new trial, on the ground that the verdict was against the law and the evidence, was overruled by the court, and judgment was entered upon the verdict. This judgment was subsequently affirmed in the District Court, and the plaintiff in error now seeks to reverse the judgments of both courts.

A bill of exceptions embodying all the testimony forms part of the record. From this it appears that the roof in question had stood eighteen years at the time of its fall, and there was a conflict of testimony as to whether it was constructed on a proper plan and properly fastened for the purpose of resisting storms, — some eight or ten experts testifying in the affirmative, and some four or five in the negative. There was also a conflict of testimony as to the severity of the storm, as compared with other storms which had previously occurred in the locality.

At the close of the testimony the defendants requested the court to instruct the jury that if the roof of the station-house, at the time of the accident, was of sufficient construction and strength to withstand the ordinary and common storms of the locality, the defendants were not liable; that the defendants were not bound to foresee and provide against extraordinary storms; and that they were not liable unless they had failed to use that care which prudent men ordinarily employ in such matters.

These instructions the court refused to give as requested, and instead thereof gave the following: —

"The defendants were guilty of negligence if they failed, in construct-

Supreme Court of Ohio.

ing or maintaining said station-house, to use that degree of care which a man of ordinary prudence is accustomed to employ, in constructing or maintaining a building for his own use for the same or like purposes, to guard against danger from storms of wind which might reasonably have been anticipated. If they used that care, they were not negligent, and cannot be held liable although they are corporations.

“And further, you must find that the storm which caused the injury was not unprecedented in that locality, but was of such character that it might reasonably have been expected to occur at that place.

“The defendants were bound to provide against storms which could reasonably have been anticipated, though likely to occur but rarely.

“But defendants were not bound to provide against a storm of wind so extraordinary in power that no experience could have anticipated its occurrence. And if the storm in question was of this character, the plaintiff cannot recover.”

This instruction of the court, it is now claimed, was erroneous. There are also various other grounds of error alleged, but it is not necessary to state them in this report.

J. T. Brooks, for plaintiff in error; *W. A. Lynch*, for defendant in error.

WELCH, C. J. — In the first paragraph of the court's instruction we think the law of the case is correctly stated. If the defendants, in the construction and maintenance of the building, used that degree of care which men of ordinary prudence are accustomed to employ in like business, they were not liable. Had the court stopped with the proposition, there clearly would have been no error in the charge. But the court went further, and told the jury that the defendants were bound to provide against all storms which could reasonably have been *anticipated*, and by plain implication told them that the defendants were bound to provide against all storms that were not “*unprecedented*,” or that were of a kind that had ever happened within the range of human “*experience*.” Taken by itself, this latter part of the charge is clearly erroneous and in conflict with the rule as first and, as we think, correctly laid down by the court. The whole charge, taken together, to say the least, was calculated to mislead the jury. Two rules, apparently in conflict with each other, were laid down for their guidance, and it is impossible to know which they followed. The *general custom* of prudent persons in such cases, and not the *absolute requirements* of the occasion, is the true standard by which the defendants should be tried. They were only bound to come up to the fair average of careful and prudent men. There are other assignments of

Notes.

error made in the case, but we only deem it necessary to say of them that we do not deem them maintainable.

Judgment reversed and cause remanded.

NOTES.

§ 1. **The Extent of this Duty.**—The duty of the carrier in this particular is nowhere better expressed than in the comprehensive rule laid down by DILLON, C. J., in *McDonald v. Chicago and North-Western Railroad Company*,¹ viz., that carriers are bound to keep in a safe condition all portions of their platforms, and approaches thereto, to which the public do or would naturally resort, and all portions of their station-grounds, reasonably near to the platforms, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go.² The carrier's liability in respect of the condition of his premises is neither greater nor less than that of any person to another who by invitation or inducement, express or implied, has come upon his premises for the purpose of transacting business. A duty of protection is owed to such persons by the carrier, but it is needless to remark that this does not amount to a warranty of the safe condition of the premises;³ neither is the carrier held bound to bestow upon their condition that extraordinary degree of vigilance which the law, from motives of the soundest policy, imposes upon him in regard to the carriage of his passengers. The passenger while in actual progress upon his journey is exposed to countless hazards, gives himself wholly in charge of the carrier; and in view of the circumstances of the case, the law requires of the carrier the exercise of the greatest possible vigilance for the benefit of the passenger, and holds him responsible for the slightest negligence.⁴ But a rule properly ceases with the reason for it; therefore, as a passenger's entrance to the carrier's station is characterized by none of the hazards incident

¹ 26 Iowa, 125, *ante*, p. 93.

² This case was retried and a second appeal taken, but the correctness of the former opinion was not questioned. See 29 Iowa, 170, 175.

³ *Welfare v. London etc. R. Co.*, L. R. 4 Q. B. 693; s. c. 38 L. J. (Q. B.) 241; 17 Week. Rep. 1065; 20 L. T. (N. S.) 743. In this case the plaintiff, who had come to the defendants' railroad station for the purpose of taking passage on one of their trains, was injured by the fall of a plank and a roll of zinc through the roof upon him as he stood inspecting the company's time-table. At the time of the accident the plaintiff saw through the hole in the roof above him the legs of a man appear. No evidence was offered as to who the man was, or in what

capacity he was engaged upon the roof. Blackburn, J., stated that the burden of proving the man on the roof to be a servant of the company was on the plaintiff, and that he was not to be presumed to be so; and further, "in this case no duty is cast on the railway company to insure that no plank shall fall. Their duty is to take reasonable care to keep their premises in such a state as that those whom they invite to come there shall not be unduly exposed to danger."

⁴ *Phila. etc. R. Co. v. Derby*, 14 How. 486, *ante*, p. 31; *Str. New World v. King*, 16 How. 469, *post*, p. 175; *Indianapolis etc. R. Co. v. Horst*, 93 U. S. 291; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557. See the next chapter.

To whom it is owed.

to the journey itself, the rigor of the rule above announced is justly relaxed, in that at such a time and place the carrier is bound to exercise only a reasonable degree of care for the protection of his patrons.¹

Thus, the fact that the edges of the steps of a staircase at a station were tipped with brass, which had been worn smooth by use, and that the staircase had a wall on each side without any hand-rail, was held no evidence of negligence, although some metal might have been used for this purpose which would not wear quite so smooth; or, as ERLE, C. J., said, a hand-rail "might be occasionally found convenient, — as, by a man with a wooden leg, or a very infirm person."² And so it was no evidence of negligence that a railroad company allowed a weighing-machine to stand upon its platform, quite out of the course of travel, for the purpose of weighing baggage, over which the plaintiff was pressed and injured by the crush of a large crowd upon a holiday.³ A railway company was held not responsible for injury to an illiterate person who in the night-time, in search of the water-closet, passed by the door having a light over it and the words "For gentlemen," and, opening a door having over it the sign "Lamp-room," but no light above it, fell down some steps which led downwards immediately from the threshold.⁴ The carrier is not liable for injuries occasioned by its buildings or structures being blown down by storms, where it has used that care and skill in their structure and maintenance which men of ordinary prudence and skill usually employ.⁵

In another case, the plaintiff was bitten by a stray dog at a railway station, while waiting for a train. It was proved that early in the evening the dog snapped at and tore the dress of another woman on the platform; that an hour and a half afterwards he attacked a cat in the signal-box, near the station, where he was kicked out by the porter, who saw no more of him. Ten minutes later the dog made his appearance on the platform, where he bit the plaintiff. It was held that there was no evidence to warrant a jury in finding that the company had been guilty of any negligence in keeping the station reasonably safe for passengers.⁶

§ 2. To whom this Duty is owed. — Although it is sometimes said that the depot-grounds and passenger-houses of a railroad company are *quasi-public*, by reason of the general use to which they are appropriated,⁷ yet persons resorting there for their own convenience, or for the transaction of business in no way connected with the railroad company, are where they have no legal right to be, and

¹ *Welfare v. London etc. R. Co.*, L. R. 4 Q. B. 693; *Pittsburgh etc. R. Co. v. Brigham*, 29 Ohio St. 374, *ante*, p. 101; *Indiana etc. R. Co. v. Hudelson*, 13 Ind. 325; *Chicago etc. R. Co. v. Wilson*, 63 Ill. 167; *Coruman v. Eastern Counties R. Co.*, 4 Hurl. & N. 781; *s. c.* 29 L. J. (Exch.) 94, *ante*, p. 76; *Crafter v. Metropolitan R. Co.*, L. R. 1 C. P. 300; *s. c.* 1 Harr. & R. 164; 12 Jur. (N. s.) 272; 35 L. J. (C. P.) 132; 14 Week. Rep. 344, *ante*, p. 88; *Toomey v. London etc. R. Co.*, 3 C. B. (N. s.) 146, *ante*, p. 72; *Rigg v. Manchester etc. R. Co.*, 12 Jur. (N. s.) 525.

² *Crafter v. Metropolitan R. Co.*, L. R. 1 C.

P. 300, *ante*, p. 88. Compare *Crocheren v. North Shore etc. Ferry Co.*, 1 Thomp. & C. 446; *Davis v. London etc. R. Co.*, 2 Fost. & Fin. 588.

³ *Cornman v. Eastern Counties R. Co.*, 4 Hurl. & N. 781, *ante*, p. 76.

⁴ *Toomey v. London etc. R. Co.*, 3 C. B. (N. s.) 146, *ante*, p. 72.

⁵ *Pittsburgh etc. R. Co. v. Brigham*, 29 Ohio St. 374, *ante*, p. 101.

⁶ *Smith v. Gt. East. R. Co.*, L. R. 2 C. P. 4.

⁷ *Illinois etc. R. Co. v. Hammer*, 72 Ill. 347. *Contra*, however, *Illinois etc. R. Co. v. Godfrey*, 71 Ill. 500.

Notes.

therefore entitled to hold the company responsible only for wanton or wilful injury.¹ Thus, persons using the station by mere permission and sufferance, — as, those taking refuge from a storm, — cannot hold the company responsible for injuries received by the station-house being partially blown down, although ordinary care was not used in its construction.² Similarly, a crowd having gathered at a railway station to witness a passing parade, the company was held not liable for injury to one of this number by the breaking down of the platform, even though the floor was not in a proper state of repair for its ordinary use.³

Persons, however, having duties to perform incidental to the departure and arrival of passengers, and all persons having business with the company, such as shippers and consignees of freight, are entitled to the use of the company's premises, and are entitled to the same protection as passengers from injury while thereon.⁴ A hackman carrying a passenger to a depot for transportation has been held to be one of this class, and he therefore recovered damages for injuries received by stepping into a cavity in the platform of the station, such defect being occasioned solely by the want of ordinary care on the part of the company.⁵ So, a consignee of freight who chose to unload the same himself, and in so doing stepped upon a piece of defective flagging, in consequence of which he was injured, was held to have higher rights than those of a mere licensee.⁶ One who desires to take passage upon the cars must exercise his right to enter and remain in the station-house in conformity with the reasonable regulations of the company as to his conduct while there; he cannot exercise it until a reasonable time next prior to the departure of the train on which he intends to go. What is such a reasonable time depends upon the circumstances of each particular case.⁷ He must also get upon the train in a proper manner, or the company will not be responsible for injuries received, even though he come in contact with an obstruction near the track in endeavoring to board the train while in motion.⁸

Where two railway companies had adjoining stations, which the passengers of each used indifferently, one of these companies was held responsible for an injury from the careless operation of a truck, laden with baggage, by a porter of the company owning the premises, to a person who was neither a passenger of theirs nor on the premises of the company on any business in which they were interested, but the passenger of another company. But this was on the principle of *respondeat superior*, as the act causing the injury was one of misfeasance done by a servant of the defendants in the course of his employment.⁹

¹ Illinois etc. R. Co. v. Godfrey, 71 Ill. 500; Pittsburgh etc. R. Co. v. Bingham, 29 Ohio St. 364; Gillis v. Penn. R. Co., 59 Pa. St. 129.

² Pittsburgh etc. R. Co. v. Bingham, 29 Ohio St. 364.

³ Gillis v. Pennsylvania R. Co., 59 Pa. St. 129.

⁴ *Ibid.*; Tobin v. Portland etc. R. Co., 95 Me. 183; Holmes v. North-Eastern R. Co., L. R. 4 Exch. 254; s. c. 38 L. J. (Exch.) 161; 17 Week. Rep. 800; 20 L. T. (N. S.) 616 (affirmed in the Exchequer Chamber, L. R. 6 Exch. 123; 40 L. J. (Exch.) 121).

⁵ Tobin v. Portland etc. R. Co., 95 Me. 183.

⁶ Holmes v. North-Eastern R. Co., *supra*. See also Wright v. London etc. R. Co., L. R. 10 Q. B. 298; s. c. affirmed in Court of Appeal, 1 Q. B. Div. 252.

⁷ Harris v. Stevens, 31 Vt. 79.

⁸ Phillips v. Rensselaer etc. R. Co., 49 N. Y. 177; Chicago etc. R. Co. v. Scates (Sup. Ct. Ill. 1879), 9 Cent. L. J. 167.

⁹ Tebbutt v. Bristol etc. R. Co., L. R. 6 Q. B. 73; s. c. 40 L. J. (Q. B.) 78; 32 L. T. (N. S.) 772.

 Illustrations of Neglect of it.

§ 3. Illustrations of Negligence in this Particular. — As before stated, at whatever point a railway company is accustomed to receive and discharge passengers, they are bound to have the place properly constructed and in a condition adequate for this purpose.¹ Thus, if the waiting-room of a station is full, or intolerably offensive by reason of tobacco-smoke, it will justify a passenger in endeavoring to enter the cars at as early a period as possible; and if in so doing he receives an injury from the unsafe and dangerous condition of the platform or steps, in a place where passengers would naturally go, the company are liable therefor if the passenger used proper care and violated no rule or regulation of the company of which he had actual knowledge, or which, as a reasonable man, he would be bound to presume to have existed.² The platform between tracks, designed for the reception and delivery of passengers, should be of sufficient width, — such that persons assembling thereon for the purpose of taking or leaving the trains may do so in safety. A platform which leaves standing-room of only about two feet in the clear when trains stand upon each track alongside, does not meet the requirements of its purpose.³ Whatever portion of the station is designed for the convenience of passengers, though having no necessary connection with the taking and leaving of trains, the company will be under the same duty to keep in proper condition of repair. Thus, having provided a telegraph office at one of its stations, for the use of its patrons, the company will be responsible to one of its passengers who is injured solely because of the company's negligence in failing to keep in proper condition the platform erected by them over which a passenger, in alighting from the cars, must pass to reach the telegraph office.⁴ A railroad company is not bound to fence its premises about a station to prevent passengers from taking a "short cut" across them at night for the purpose of reaching the train sooner than by the customary way;⁵ but if the company hold out an inducement or invitation to its patrons to do so, they will be liable for injuries received on account of the defective condition of the premises so traversed.⁶ The fact that no one, without some previous knowledge, can be expected to provide against the contingency of a street car, with the railway upon which it stands, coming upon him by a side movement, imposes upon the company moving their cars from one track to another, in this unusual manner, a degree of care in so doing proportionate to the dangers arising therefrom.⁷

¹ *McDonald v. Chicago etc. R. Co.*, ante, p. 33; *Liscomb v. New Jersey etc. R. Co.*, 6 Lans. 75; *Hulbert v. New York etc. R. Co.*, 40 N. Y. 145; *Knight v. Portland etc. R. Co.*, 56 Me. 234; *Martin v. Great Northern R. Co.*, 16 C. B. 179. In *Chicago etc. R. Co. v. Fillmore*, 57 Ill. 265, the plaintiff, in attempting to get upon the defendants' train, fell through a bridge over a highway sixteen feet below. The bridge was under the control of the defendants, and in the immediate vicinity of their track. The bridge happened to be temporarily uncovered for repairs. The defendants were held responsible for this injury. Said the court, speaking of the duty of railway companies in such

cases: "They should omit no act, the omission of which would endanger the limbs or lives of those who seek to ride upon their trains."

² *McDonald v. Chicago etc. R. Co.*, 26 Iowa, 124, ante, p. 93.

³ *Chicago etc. R. Co. v. Wilson*, 63 Ill. 167.

⁴ *Clussman v. Long Island etc. R. Co.*, 9 Hun. 618.

⁵ *Burgess v. Great Western R. Co.*, 6 C. B. (N. S.) 923.

⁶ *Longmore v. Great Western R. Co.*, 19 C. B. (N. S.) 183.

⁷ *Gordon v. Grand Street etc. R. Co.*, 40 Barb. 546.

Notes.

It is the duty of the corporation to have its stations open and lighted, and its servants present, for the accommodation of those who may wish to leave its trains or depart by the same.¹ Therefore, to leave open a flight of stairs at the end of the station-house, by which a person may descend into a pitfall when the place is not lighted,² or to put off an aged woman at her destination in the night-time, at a station neither open nor lighted, and without any one in attendance to give her necessary directions, whereby she was injured in wandering about the depot, although not by reason of the defective construction of the premises,³ will constitute negligence in this particular.

If, in the ordinary course of transportation, it is necessary for a passenger to leave the train and proceed a considerable distance over the company's premises for the purpose of taking another train, he has the right to assume that the way provided for the purpose may be used with safety even on a dark night.⁴ In *Hulbert v. New York, etc. Railroad Company*,⁵ the plaintiff's intestate, having been carried beyond his destination in the night-time, was instructed by the conductor of the train to go on to a station at which a train would be met going in the opposite direction, on which he might return. The train reached this station at about two o'clock in the morning, and stopped at a water-house about two hundred and fifty feet west of the station. The passenger immediately got out, and without making any inquiries, walked between the tracks with the intention of taking the westward-bound train which stood at a water-tank about two hundred feet east of the station. There were no lights at the station-house which he passed, and none upon the premises except upon the trains. While passing alongside the train which he was about to enter, he fell into an excavation close to the track, which had formerly been used as a cattle-guard, and was seriously injured. It appeared that the station-house was not open for that train, and that passengers occasionally got on board of it at the water-tank as this passenger was endeavoring to do; but there was a conflict of testimony as to whether the train, after leaving the water-tank, always stopped at the station-house for passengers. It was held that it was a question for the jury whether the passenger was guilty of negligence in endeavoring to reach the train as he did, without making inquiries as to whether either train would stop at the station;

¹ *Beard v. Connecticut etc. R. Co.*, 48 Vt. 101; *Patten v. Chicago etc. R. Co.*, 32 Wis. 524; *Hulbert v. New York etc. R. Co.*, 40 N. Y. 145; *Knight v. Portland etc. R. Co.*, 56 Me. 234; *Nicholson v. Lancashire etc. R. Co.*, 3 Hurl. & Colt. 534, *ante*, p. 85; *Martin v. Great Northern R. Co.*, 16 C. B. 179; *Osborn v. Union Ferry Co.*, 53 Barb. 629.

² *Beard v. Connecticut etc. R. Co.*, 48 Vt. 101.

³ *Patten v. Chicago etc. R. Co.*, 32 Wis. 524.

⁴ *Hulbert v. New York etc. R. Co.*, 40 N. Y. 145; *Knight v. Portland etc. R. Co.*, 56 Me. 234. *Contra*, *Falkiner v. Great Southern etc. R. Co.*, Irish Rep. 5 C. L. 213. In *Vicksburg etc. R. Co. v. Howe*, 52 Miss. 202, it was necessary to transfer the passengers on a dark and rainy night from one train to another,

at a point where there was no station, on account of the wrecking of a freight-train, which blockaded the track. Between the two trains was a ditch about three feet deep, which had to be crossed, over which was placed a plank for the use of passengers. A fire had been built by the train-men, not very far from the crossing of the ditch, and there were many lanterns in the hands of different employees scattered about the vicinity, but the attention of passengers was not particularly directed to the ditch. The plaintiff, a passenger, in endeavoring to go from one train to the other, fell into this ditch and broke his leg, for which injury the defendants were held responsible, as arising from their neglect of necessary precautions.

⁵ *Supra*.

Injuries to Passengers in leaving Train.

and further, that under the circumstances the jury were authorized to find the defendant guilty of negligence in leaving the ground in so dangerous a condition, there being evidence that passengers often got into this train while standing at the water-tank near the dangerous place.¹ So, in *Nicholson v. Lancashire, etc. Railway Company*,² the plaintiff, a passenger by the defendant's railway, was set down after dark on the side of the line opposite to the station and place of egress. The train was detained more than ten minutes, and from its length blocked up the ordinary crossing to the station, which was on the level. The ticket-collector stood near the crossing with a light, telling the passengers, as they delivered their tickets, to "pass on." The plaintiff passed down the train to cross behind it, and, on account of the place being unlighted, fell over some baggage which had been put off the train, and was injured. It was the practice of passengers to cross behind the train when long, without interference from the servants of the company. These facts disclosed evidence for the jury of negligence on the part of the company.³

¹ See also *Dillaye v. New York etc. R. Co.*, 56 Barb. 30, and the very similar case of *Martin v. Great Northern R. Co.*, 16 C. B. 179, the facts of which were, that the plaintiff presented himself at the station just as the train was about to start. He desired to go on the "up line." The station was so constructed that passengers wishing to go to a train on the "up line" must cross the "down line," for which purpose there was at the end of the platform of the "down line" a crossing at right angles to the platform on the other side. When the plaintiff arrived at the station he was told that he was in time, but received no directions as to how the train was to be reached. Being in a hurry, he did not observe the crossing; but seeing the red lights of the train at some little distance up the line, he ran straight on from the end of the platform, and came in contact with a switch-handle, which injured him. There was contradictory evidence as to the sufficiency of the light at the station. It was, however, conceded that there was no light at the switch, and no fence or railing to prevent persons from walking down an inclined plane at the end of the station and onward to the point where the injury was received. On these facts, the question of plaintiff's negligence (the defence being that the accident was due entirely to the plaintiff's negligence) was held to be properly submitted to the jury, who found for the plaintiff.

The rule that the company must provide safe and convenient means of entrance to and egress from their cars, obviously has no application to the case of a passenger on the caboose-car of a freight-train. Such passengers must be held to assume the dis-

comforts and dangers incidental to this mode of travel, in this particular, although the company are responsible for negligence of their servants in the transportation. Passengers on freight-trains are liable to be taken up and put down at very considerable distances from the stations and at various points; therefore it would be unreasonable to expect the company to keep its line for a half a mile on each side of each station upon its road in a condition as safe and convenient as stations ordinarily are, simply that these occasional patrons might be accommodated. *Murch v. Concord etc. R. Co.*, 29 N. H. 9, 42.

² 3 Hurl. & Colt. 534, *ante*, p. 85.

³ In *Knight v. Portland etc. R. Co.*, 56 Me. 234, the plaintiff's ticket entitled her to passage over the defendants' road to Portland, and by steamboat from Portland to Belfast. The defendants' depot was distant from the steamboat-landing about forty rods. The defendants owned the wharf, and had built their track upon it down to the steamboat-landing. Trains were formerly run upon it for the accommodation of passengers, but had been discontinued; baggage-cars were, however, still run as before. Passengers were directed to use the wharf as a passage-way to the steamboat, and they did so use it. The plaintiff in this case, though directed by none of the officers of the railroad or steamboat, proceeded in company with other passengers from the depot to the place of embarkation, until within a few feet of the edge of the wharf, when she fell into a hole and sustained injury, for which the defendants were held responsible. Said Appleton, C. J.: "The train arrives in the evening. Passengers from the cars to the boat pass rapidly

Notes.

It is culpable negligence on the part of a railroad company to allow snow and ice to accumulate upon the platforms of their stations. They should be on the alert during cold weather to see whether there is ice upon the platform, and to remove it, or make it safe by sanding it or in some other manner.¹

The obligation of keeping the station in a reasonably safe condition imposes upon the servants of the company the necessity of discharging their duties in a prudent manner, such that the security of the passenger shall not be jeopardized. Thus, in *Jeffersonville, etc. Railroad Company v. Riley*,² the company was held responsible for the act of a brakeman in throwing a burning stick of wood from the train, which struck a passenger on the head who was walking upon the platform. In *Caswell v. Boston, etc. Railroad Company*,³ the plaintiff, while standing in a proper place to await the arrival of a train, was placed in great danger from the approach of a train in an unexpected direction, by reason of the displacement of a switch through culpable negligence of servants of the company. She became alarmed, and in running away to escape the apprehended peril, fell and was injured. A verdict against the company was sustained, although the course which the plaintiff took in running off brought her into greater peril from the approach of the train, and although the immediate cause of her fall was tripping over the rail of the track on which she was running.

over the intervening distance. The wharf should be lighted. The servants of the defendant corporation should be in readiness to point out the way. The wharf should be safe." See also the language of Maule, J., in his charge to the jury in *Martin v. Great Northern R. Co.*, 16 C. B. 179, 186: "If they [the company] choose to allow people to cross the line at the last moment, it seems to me they should have a person to point out to passengers who are in a hurry the right course for them to take, and to tell them, 'You must turn here,' or 'You must turn

there,' or 'You must go across the railway there.' Or, if they do not have a man, they might have a board placed at the end of the platform with 'To the train,' in large letters, painted upon it, and a hand upon that board pointing in the direction which people are to take."

¹ *Weston v. New York etc. R. Co.*, 10 Jones & Sp. 156; *Seymour v. Chicago etc. R. Co.*, 3 Biss. 43; *Shepherd v. Midland R. Co.*, 20 Week. Rep. 705.

² 39 Ind. 568.

³ 98 Mass. 194.

CHAPTER V.

LIABILITY OF THE CARRIER FOR NEGLIGENCE.

- LEADING CASES: 1. *Ingalls v. Bills*. — Liability of carrier for injury to passenger from defects in his vehicle — Contributory negligence of passenger.
2. *Readhead v. Midland Railway Company*. — Liability of carrier for injury to passenger from defects in his vehicle.
3. *Hegeman v. Western Railroad Corporation*. — The same subject.
4. *Steamboat New World v. King*. — The same subject, in its application to free passengers.
5. *Christie v. Griggs*. — Presumption of negligence from the happening of the accident.
6. *Stokes v. Saltonstall*. — The same subject — Contributory negligence of the passenger.
7. *Curtis v. Rochester and Syracuse Railroad Company*. — The same subject.

NOTES: I. GENERAL DOCTRINES.

- § 1. Grounds on which this liability rests.
2. Overruled cases holding carriers of passengers liable as insurers.
3. Such carriers not warrantors of their vehicles and roads, but liable only for negligence.
4. Bound to use extraordinary care.
- (1.) General expressions of the doctrine.
- (2.) Expressions in railway cases.
- (3.) Expressions in stage-coach cases.
- (4.) Expressions in steamboat cases.
5. Modified expressions of the rule in American cases.
6. The modern English rule of reasonable care.
7. American expressions of this rule.
8. Limitations upon the rule of extraordinary care.
9. Presumption of negligence from the happening of the accident.

II. IN FAILING TO PROVIDE A SAFE VEHICLE AND ROADWAY.

- § 10. Duty to adopt latest improvements.
11. Accidents from latent defects in vehicles.
12. Defects in the carrier's roadway.
13. Negligence of manufacturer or contractor imputed to carrier.
14. This obligation of the carrier, how affected by statute.

 Ingalls v. Bills.

NOTES: III. RAILWAY CARRIERS.

- § 15. Duties of railway companies in general.
16. Duty to afford a reasonable time for passengers to get on and off trains.
17. Trains overshooting or falling short of the platform of the station.
18. Invitation to alight, express or implied.
19. Injuries to passengers on the track.
20. Degree of care required in transportation of passengers on freight-trains.

IV. STAGE PROPRIETORS.

- § 21. Duties of stage proprietors — The law as laid down by Mr. Justice Story.
22. Duty to furnish competent drivers.
23. Care and vigilance exacted of the driver.
24. Overloading the vehicle.

 1. LIABILITY OF CARRIER FOR INJURY TO PASSENGER FROM DEFECTS IN HIS VEHICLE — CONTRIBUTORY NEGLIGENCE OF PASSENGER.

INGALLS v. BILLS.*

*Supreme Judicial Court of Massachusetts, 1845.*HON. LEMUEL SHAW, *Chief Justice.*

" SAMUEL S. WILDE,	} <i>Judges.</i>
" CHARLES A. DEWEY,	
" SAMUEL HUBBARD,	

1. **Measure of Liability.** — Proprietors of coaches who carry passengers for hire are answerable to a passenger for an injury which happens by reason of any defect in a coach, which might have been discovered by the most careful and thorough examination, but not for an injury which happens by reason of a hidden defect which could not, upon such examination, have been discovered.
2. **Illustration — Breaking of Axle through Secret Defect.** — A passenger in a coach received an injury solely by reason of the breaking of one of the iron axletrees, in which there was a very small flaw entirely surrounded by sound iron one-fourth of an inch thick, and which could not be discovered by the most careful examination externally. *Held*, that the proprietors of the coach were not answerable for the injury thus received.
3. **Contributory Negligence of the Passenger.** — If a passenger in a coach, by reason of a peril arising from an accident for which the proprietors thereof are liable, is in so dangerous a situation as to render his leaping from the coach an act of reasonable precaution, and he leaps therefrom and thereby breaks a limb, the proprietors are answerable to him in damages, though he might safely have retained his seat.

* Reported, 9 Mete. 1.

Supreme Judicial Court of Massachusetts.

ASSUMPSIT on an implied promise of the defendants, as coach proprietors and common carriers of passengers, to convey the plaintiff safely from Boston to Cambridge.

At the trial in the Court of Common Pleas, before WILLIAMS, C. J., the plaintiff introduced evidence tending to prove that, on the 23d of September, 1841, he and several other persons took outside seats, as passengers, on the top of the defendants' coach, to be conveyed from Boston to Cambridge; that on the way, in Court Street in Boston, while proceeding at a moderate rate, and without coming in contact with any thing or meeting any obstruction, the hind axletree of the coach broke, one of the hind wheels came off, and the coach settled down on one side, without being overset; that the plaintiff and some other outside passengers, being alarmed, jumped from the top of the coach upon the pavement, and that the plaintiff's left arm was thereby badly injured.

The defendants introduced evidence tending to prove that they had taken all possible care and incurred extraordinary expense in order that the said coach should be of the best materials and workmanship; that at the time of the accident, the coach, so far as could be discovered from the most careful inspection and examination externally, was strong, sound, and sufficient for the journey; and that they had uniformly exercised the utmost vigilance and care to preserve and keep the same in a safe and roadworthy condition. But the evidence further tended to prove that there was an internal defect or flaw in the iron of the axletree, at the place where it was broken as aforesaid, about three-eighths of an inch in length and wide enough to insert the point of a fine needle or pin, which defect or flaw appeared to have arisen from the forging of the iron, and which might have been the cause of the said breaking; that the said defect was entirely surrounded by sound iron one-quarter of an inch thick; and that the flaw or defect could not possibly have been discovered by inspection and examination externally.

Upon this evidence, the defendants moved the court to instruct the jury that it was the duty of the defendants to use all possible care in providing a good coach, in keeping the same in due repair, and in due examination into its condition, and if they took such care, and the accident happened without any fault or negligence on their part, but by reason of a defect which they could not discover, then the verdict should be for them; and that the plaintiff was not entitled to a verdict unless the jury were of opinion that there was some degree of actual fault or negligence on the part of the defendants.

Ingalls v. Bills.

The judge declined giving these instructions, but submitted the evidence to the jury, with instructions that the defendants were bound by law, and by an implied promise on their part, to provide a coach not only apparently, but really, roadworthy; that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible and could not be discovered upon inspection and examination; and that if the jury were satisfied, from the evidence, that the axletree broke in consequence of the original flaw or defect in the interior thereof, and the plaintiff was injured thereby, he was entitled to a verdict, although that flaw was invisible and could not be discovered by inspection and examination externally.

The defendants further insisted that if the plaintiff jumped from the coach without necessity, and that necessity brought upon him by them, they were not liable; and that although a passenger might have jumped off without imprudence, still, if the plaintiff might have remained in his seat without imprudence, his jumping off was to be considered as his own act, and was done at his own peril.

Upon this point the judge directed the jury to inquire whether the plaintiff's jumping off was, under the existing circumstances, an act of reasonable precaution; and instructed them that if the plaintiff was placed in such a perilous situation, in consequence of the defendants' failure to fulfil their obligation aforesaid, that as a prudent precaution, for the purpose of self-preservation, he was induced to leap from the coach, the owners were answerable for any injury he might have sustained thereby, although it might now appear that he might without injury have retained his seat.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

The argument was had at the last March term.

Parsons, for the defendants. — Carriers of passengers are not liable for accidents which no skill or care can prevent. They are not insurers, and are only bound to transport passengers as safely as human foresight and care will permit. The distinction between the liabilities of carriers of goods and carriers of passengers has long been established.¹ It is impossible to distinguish the case at bar from the case of *Christie*

¹ 2 Kent's Comm. (3d ed.) 598-601; Story on Bail. (3d ed.), §§ 498, 571a, 590, 592; *Aston v. Heaven*, 2 Esp. 533; *McKinney v. Neil*, 1 McLean, 340; *Camden etc. R. Co. v. Burke*, 13 Wend. 611, 627; *Jackson v. Tollett*, 2 Stark.

37; *Dudley v. Smith*, 1 Camp. 167; *Hollister v. Nowlen*, 19 Wend. 236; *Crofts v. Waterhouse*, 3 Bing. 321; s. c. 11 J. B. Moo. 137; *Boyce v. Anderson*, 2 Pct. 150; *Stokes v. Saltonstall*, 13 Pet. 181; *Ware v. Gay*, 11 Pick. 106.

Supreme Judicial Court of Massachusetts.

v. *Griggs*,¹ where MANSFIELD, C. J., said, "if the axletree was sound as far as human eye could discover, the defendant was not liable."

L. Williams and *Nutter*, for the plaintiff. — Though there is a well-settled distinction between the liabilities of common carriers of goods, and passenger carriers, yet the latter are liable for the insufficiency of their carriages. They warrant that their vehicles are fit for the use to which they are applied. This principle removes the apparent discrepancy in the adjudged cases.² In *Crofts v. Waterhouse*,³ BEST, C. J., says, the coachman (among other things) must be provided with "a coach and harness of sufficient strength and properly made. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." In *Christie v. Griggs*,⁴ MANSFIELD, C. J., said it lay on the defendant "to show that the coach was as good a coach as could be made;" and this is recognized as law in 11 Pick. 112.

The case of *Sharp v. Grey*⁵ is decisive for the present plaintiff. The action in that case, as in the case at bar, was *assumpsit* on an undertaking to convey the plaintiff safely. GASELEE, J., said, "The burden lay on the defendant to show there had been no defect in the construction of the coach. Whether there had been or not was a question of fact, on which the jury have determined. In *Christie v. Griggs*, the accident was occasioned by a kennel which crossed the road, and not by any defect in the vehicle." BOSANQUET, J., said, "The defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axletree. If so, when the coach started it was not road-worthy, and the defendant is liable for the consequence, upon the same principle as a ship-owner who furnishes a vessel which is not seaworthy." A ship-owner is answerable for the consequences of a *latent* defect in his vessel.⁶

The decision in *Crofts v. Waterhouse*⁷ does not conflict with the doctrine for which the plaintiff contends. That was an action for negligence, and of course could not be maintained without proof of negligence.

Greenleaf, in reply. — The decision in *Sharp v. Grey* went no further than former decisions. In that case, the defect in the axletree might have been discovered on inspection, and it was left to the jury to "consider whether there had been, on the part of the defendant, that degree

¹ 2 Camp. 80.

² *Israel v. Clark*, 4 Esp. 259; *Bremner v. Williams*, 1 Car. & P. 414; 2 Stephen's N. P. 933; Selw. N. P. (11th ed.) 420.

³ 3 Bing. 321.

⁴ 2 Camp. 80.

⁵ 9 Bing. 457; 2 Moo. & S. 620.

⁶ *Putnam v. Wood*, 3 Mass. 481; *Lyon v. Mells*, 5 East, 428; Abb. on Ship. (4th Am. ed.) 218.

⁷ 3 Bing. 319.

Ingalls v. Bills.

of vigilance which was required by his engagement to carry the plaintiff safely." The jury found that there had not been such vigilance, and the court refused to set aside the verdict. The defendant was held liable for *negligence*, and not for unavoidable accident. In the case at bar, the defect in the axletree could not have been discovered. And *Harris v. Costar*¹ shows that a count upon an undertaking to carry a passenger safely cannot be supported without proof of some actual negligence of the defendant.²

The silence of the books on the subject of an action by a passenger against a ship-owner for injury caused by a latent defect in a vessel is an answer to the plaintiff's argument drawn from a simile used by BOSANQUET, J., in *Sharp v. Grey*.

HUBBARD, J. — The question presented in this case is one of much importance to a community like ours, so many of whose citizens are engaged in business which requires their transportation from place to place in vehicles furnished by others; and though speed seems to be the most desirable element in modern travel, yet the law points more specifically to the security of the traveller.

Under the charge of the learned judge who tried this case, we are called upon to decide whether the proprietors of stage-coaches are answerable for all injuries to passengers arising from accidents happening to their coaches, although proceeding from causes which the greatest care in the examination and inspection of the coach could not guard against or prevent; or, in other words, whether a coach must be alike free from secret defects which the owner cannot detect after the most critical examination, as from those which might, on such an examination, be discovered.

The learned judge ruled that the defendants, as proprietors of a coach, were bound by law, and by an implied promise on their part, to provide a coach, not only apparently, but really, roadworthy; and that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible, and could not be discovered upon inspection and examination.

The law respecting common carriers has ever been rigidly enforced, and probably there has been as little relaxation of the doctrine as maintained by the ancient authorities, respecting this species of contract, as in any one branch of the common law. This arises from the great confidence necessarily reposed in persons engaged in this employment.

¹ 1 Car. & P. 636.

² See *Bretherton v. Wood*, 3 Brod. & B. 54.

Supreme Judicial Court of Massachusetts.

Goods are intrusted to their sole charge and oversight, and for which they receive a suitable compensation; and they have been and still are held responsible for the safe delivery of the goods, with but two exceptions, viz., the act of God and of the king's enemies; so that the owners of goods may be protected against collusive robberies, against thefts and embezzlements, and negligent transportation. But in regard to the carriage of passengers, the same principles of law have not been applied; and for the obvious reason that a great distinction exists between persons and goods, the passengers being capable of taking care of themselves, and of exercising that vigilance and foresight in the maintenance of their rights which the owners of goods cannot do, who have intrusted them to others.

It is contended by the counsel for the plaintiff that the proprietor of a stage-coach is held responsible for the safe carriage of passengers so far that he is a warrantor that his coach is roadworthy, that is, is absolutely sufficient for the performance of the journey undertaken; and that if an accident happens, the proof of the greatest care, caution, and diligence in the selecting of the coach, and in the preservation of it during its use, will not be a defence to the owner; and it is insisted that this position is supported by various authorities. The cases, among many others cited, which are more especially relied upon are those of *Israel v. Clark*,¹ *Crofts v. Waterhouse*,² *Bremner v. Williams*,³ and *Sharp v. Grey*.⁴ If these cases do uphold the doctrine for which they are cited, they are certainly so much in conflict with other decided cases that they cannot be viewed in the light of established authorities. But we think, upon an examination of them, and comparing them with other cases, they will not be found so clearly to sustain the position of the plaintiff as has been argued.

It must be borne in mind that the carrying of passengers for hire in coaches is comparatively a modern practice, and that though suits occur against owners of coaches for the loss of goods, as early as the time of Lord HOLT, yet the first case of a suit to recover damages by a passenger, which I have noticed, is that of *White v. Boulton*,⁵ which was tried before Lord KENYON in 1791, and published in 1795. That was an action against the proprietors of the Chester mail-coach for the negligence of the driver, by reason of which the coach was overturned and the plaintiff's arm broken, and in which he recovered damages for

¹ 4 Esp. 259.² 3 Bing. 319.³ 1 Car. & P. 414.⁴ 9 Bing. 457. ⁵ Peak. 113.

Ingalls v. Bills.

the injury; and Lord KENYON, in delivering his opinion, said, "When these [mail] coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly." The correctness of the opinion cannot be doubted in its application to a case of negligence. The meaning of the word "safely," as used in declarations for this species of injury, is given hereafter.

The next case which occurred was that of *Aston v. Heaven*,¹ in 1797, which was against the defendants, as proprietors of the Salisbury stage-coach, for negligence in the driving of their coach, in consequence of which it was upset and the plaintiff injured. This action was tried before EYRE, C. J. It was contended by the counsel for the plaintiff that coach-owners were liable in all cases except where the injury happens from the act of God or of the king's enemies; but the learned judge held that cases of loss of goods by carriers were totally unlike the case before him. In those cases, the parties are protected by the custom; but as against carriers of persons, the action stands alone on the ground of negligence.

The next case was that of *Israel v. Clark*,² in 1803, where the plaintiff sought to recover damages for an injury arising from the overturning of the defendants' coach in consequence of the axletree having broken; and one count alleged the injury to have arisen from the overloading of the coach. It was contended that if the owners carried more passengers than they were allowed by act of Parliament, that should be deemed such an overloading. To this Lord ELLENBOROUGH, who tried the cause, assented, and said, "If they carried more than the statute allowed, they were liable to its penalties; but they might not be entitled to carry so many; it depended on the strength of the carriage. They were bound by law to provide sufficient carriages for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear landworthiness in the carriage itself to be established." This is one of the cases upon which the present plaintiff specially relies. It was a *nisi prius* case, and it does not appear upon which count the jury found their verdict. But the point pending in the present case was neither discussed nor started, viz., whether the accident arose from the negligence of the owner in not providing a coach of sufficient strength, or from a secret defect not discoverable upon the most careful examination. No opinion was expressed whether the action rests upon negligence or upon an implied warranty. But it

¹ 2 Esp. 533.

² 4 Esp. 259.

Supreme Judicial Court of Massachusetts.

was stated that the defendants were bound by law to provide sufficient carriages for the passage, and at all events that there should be a clear landworthiness in the carriage itself.

The general position is not denied with regard to the duty of an owner to provide safe carriages. The duty, however, does not in itself import a warranty. The judge himself may have used stronger expressions, in the terms "landworthiness in the carriage," than he intended by the thought of seaworthiness in a ship, and the duty of ship-owners in that respect. If the subject had been discussed, and the distinctions now presented had been raised, and then the opinion had followed as expressed in the report, it would be entitled to much more consideration than the mere strength of the words now impart to it.

The next case was that of *Christie v. Griggs*,¹ in 1809. There, the axletree of the coach snapped asunder at a place where there was a slight descent from the kennel crossing the road, and the plaintiff was thrown from the top of the coach. Sir JAMES MANSFIELD, in instructing the jury, said: "As the driver had been cleared of negligence, the question for the jury was as to the sufficiency of the coach. If the axletree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods, the carrier was answerable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered."

The case of *Bremner v. Williams*,² in 1824, is relied on by the plaintiff. There, BEST, C. J., said he considered that "every coach proprietor warrants to the public that his stage-coach is equal to the journey it undertakes, and that it is his duty to examine it previous to the commencement of every journey." And so, in *Crofts v. Waterhouse*,³ in 1825, BEST, C. J., said, "The coachman must have competent skill, and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." But though this

¹ 2 Camp. 79.

² 1 Car. & P. 414.

³ 3 Bing. 321.

Ingalls v. Bills.

language is strong, and would apparently import a warranty, on the part of the stage proprietor, as to the sufficiency of his coach, yet PARK, J., in the same case, said, "a carrier of passengers is only liable for negligence." This shows that the court did not mean to lay down the law that a stage proprietor is in fact a warrantor of the sufficiency of his coach and its equipments, but that he is bound to use the utmost diligence and care in making suitable provision for those whom he carries; and we think such a construction is warranted by the language of the same learned judge (BEST) in the case of *Harris v. Costar*,¹ in 1825, where the averment in the declaration was that the defendant undertook to carry the plaintiff *safely*. The judge held that it did not mean that the coach proprietor undertook to convey safely absolutely, but that it was to be construed like all other instruments, taking the whole together, and meant that the defendants were to use due care.

But the case mainly relied upon by the plaintiff is that of *Sharp v. Grey*,² where the axletree of a coach was broken and the plaintiff injured. There, the axle was an iron bar enclosed in a frame of wood of four pieces, secured by clamps of iron. The coach was examined, and no defect was obvious to the sight. But after the accident a defect was found in a portion of the iron bar, which could not be discovered without taking off the wood-work; and it was proved that it was not usual to examine the iron under the wood-work, as it would rather tend to insecurity than safety. It does not appear, by the statement, that the defect could not have been seen on taking off the wood-work, but it would rather seem that it might have been discovered. However that may be, the language of different judges, in giving their opinions, is relied upon as maintaining the doctrines contended for by the plaintiff. GASELEE, J., held that "the burden lay on the defendant to show there had been no defect in the construction of the coach." BOSANQUET, J., said "the CHIEF JUSTICE [who tried the case] held that the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axletree. If so, when the coach started it was not roadworthy, and the defendant is liable for the consequences upon the same principle as a ship-owner who furnishes a vessel which is not seaworthy." AND ALDERSON, J., said he was of the same opinion, and that "a coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation. The injury in the present case appears to have been occasioned by an

Supreme Judicial Court of Massachusetts.

original defect of construction; and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles and his passengers be without remedy."

This case goes far to support the plaintiff in the doctrine contended for by his counsel, as it would seem to place the case upon the ground that the coach proprietor must, at all events, provide a coach absolutely and at all times sufficient for the journey, and that he is a warrantor to the passenger to provide such a coach; but we incline to believe the learned judges gave too much weight to the comparison of *BOSANQUET, J.*, — viz., that a coach must be roadworthy on the same principle that a ship must be seaworthy. We think the comparison is not correct, and that the analogy applies only where goods are carried, and not where passengers are transported. And no case has been cited where a passenger has sued a ship-owner for an injury arising to him personally in not conducting him in a seaworthy ship. If more was intended by the learned court than that a coach proprietor is bound to use the greatest care and diligence in providing suitable and sufficient coaches and keeping them in a safe and suitable condition for use, we cannot agree with them in opinion. To give their language the meaning contended for in the argument of the case at bar, is, in fact, to place coach proprietors in the same predicament with common carriers, and to make them responsible, in all events, for the safe conduct of passengers, so far as the vehicle is concerned. But that the case of *Sharp v Grey* is susceptible of being placed on the ground which we think tenable, namely, that negligence, and not warranty, lies at the foundation of actions of this description, may be inferred from the language of Mr. Justice PARK, who, in giving his opinion, says, "this was entirely a question of fact. It is clear that there was a defect in the axletree; and it was for the jury to say whether the accident was occasioned by what, in law, is called negligence in the defendant, or not." And TINDAL, C. J., who tried the cause before the jury, left it for them to consider whether there had been that vigilance which was required by the defendant's engagement to carry the plaintiff safely; thus apparently putting the case on the ground of negligence, and not of warranty.¹

The same question has arisen in this country, and the decisions exhibit a uniformity of opinion that coach proprietors are not liable as common carriers, but are made responsible by reason of negligence. In the case of *Camden and Amboy Railroad Company v. Burke*,² the

¹ See also *Bretherton v. Wood*, 3 Brod. & B. 54; 6 J. B. Moo. 141; *Ansell v. Waterhouse*, 6 Man. & Sel. 385; 2 Chit. 1.

² 13 Wend. 626.

Ingalls v. Bills.

court say that the proprietors of public conveyances are liable at all events for the baggage of passengers; but as to injuries to their persons, they are only liable for the want of such care and diligence as is characteristic of cautious persons. And in considering the subject again, in the case of *Hollister v. Nowlen*,¹ they say that "stage-coach proprietors, and other carriers by land and water, incur a very different responsibility in relation to the *passenger* and his *baggage*. For an injury to the passenger, they are answerable only where there has been a want of proper care, diligence, or skill; but in relation to baggage, they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or the public enemies."

In a case which occurred in respect to the transportation of slaves,² Chief Justice MARSHALL, in giving the opinion of the court, says: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried and in cases to which it has been applied we admit its necessity and policy, we do not think it ought to be carried further, or applied to *new cases*. We think it has not been applied to living men, and that it ought not to be applied to them." So in the case of *Stokes v. Saltonstall*,³ the question arose and was thoroughly discussed; and the same opinions are maintained as in the cases above cited from Wendell. And the whole subject is examined by Judge Story, in his treatise on *Bailments*,⁴ with his usual learning, and his result is the same.

If there is a discrepancy between the English authorities which have been cited, we think the opinions expressed by Chief Justice EYRE and Chief Justice MANSFIELD are most consonant with sound reason as applicable to a branch of the law comparatively new, and, though given at *nisi prius*, are fully sustained by the discussions which the same subject has undergone in the courts of our own country. We have said as being the most consonant with sound reason or good common sense as applied to so practical a subject; because, if such a warranty were imposed by force of law upon the proprietors of coaches and other vehicles for the conveyance of passengers, they would in fact become the warrantors of the work of others, over whom they have no actual control, and—from the number of artisans employed in the construction of the materials of a single coach—whom they could not follow. Unless, therefore, by the application of a similar rule, every workman shall be held as the warrantor, in all events, of the strength, sufficiency,

¹ 19 Wend. 236.

² *Boyce v. Anderson*, 2 Pet. 155.

³ 13 Pet. 181.

⁴ §§ 592-600.

Supreme Judicial Court of Massachusetts.

and adaptation of his own manufactures to the uses designed, — which, in a community like ours, could not be practically enforced, — the warranty would really rest on the persons purchasing the article for use, and not upon the makers.

If it should be said that the same observations might be applied to ship-owners, the answer might be given that they have never been held as the warrantors of the safety of the passengers whom they conveyed; and as to the transportation of goods, owners of general ships have always been held as common carriers, for the same reasons that carriers on land are bound for the safe delivery of goods intrusted to them. But as it respects the seaworthiness of a ship, the technical rules of law respecting it have been so repeatedly examined, and the facts upon which they rest so often investigated, that the questions which arise are those of fact and not of law, and in a vast proportion of instances depend upon the degree of diligence and care which are used in the preservation of vessels, and practically resolve themselves into questions of negligence; so that the rules are very few that arise from the maintenance of the doctrine that a ship must be seaworthy in order to be the subject of insurance.

The result to which we have arrived, from the examination of the case before us, is this: That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. And we are of opinion that the instructions which the defendants' counsel requested might be given to the jury in the present case were correct in point of law, and that the learned judge erred in extending the liability of the defendants further than was proposed in the instructions requested.

The point arising on the residue of the instructions was not pressed

Readhead v. Midland Railway Company.

in the argument; and we see no reason to doubt its correctness, provided the peril to which the plaintiff was exposed arose from a defect or accident for which the defendants were otherwise liable.¹

New trial granted.

2. LIABILITY OF CARRIER FOR INJURY TO PASSENGER FROM DEFECTS IN HIS VEHICLE.

READHEAD v. MIDLAND RAILWAY COMPANY.*

Court of Queen's Bench, 1867, and Court of Exchequer Chamber, 1869.

1. **Measure of Liability.**—A carrier of passengers is not answerable as an insurer for the safety of his vehicles and appliances, but is liable for an accident which may happen to a passenger from any defect therein which might have been prevented by the exercise of due care on his part.
2. **Illustration—Breaking of Wheel through Secret Defect.**—A passenger was injured in consequence of the breaking of the tire to a wheel of a railway carriage. The tire broke in consequence of an air-bubble which had remained there in its original manufacture. It was shown that the occasional presence of air-bubbles in the tires of railway-car wheels could not be prevented by any means known to the manufacturer of such wheels, and that their existence could not be discovered by any known tests. It was held that the passenger could not recover damages from the railway company.

DECLARATION: That the defendants were carriers of passengers by railway from Nottingham to South Shields for reward; that the plaintiff became a passenger, to be safely and securely carried by them as such carriers, in a certain train, for reward; that the defendants managed and conducted the train so carelessly, and took so little care in providing a proper and safe carriage, and were so careless and negligent in examining from time to time the wheels of the carriage in which the plaintiff was, that the carriage was broken to pieces and the plaintiff injured.

Plea, not guilty.

At the trial before LUSH, J., at the Durham Spring Assizes, 1866, the evidence given for the plaintiff was, that he was a second-class passenger from Nottingham to South Shields by an express train on the defendants' railway; he changed carriages at Trent, and after proceed-

* Reported, L. R. 2 Q. B. 412. The case was tried at *nisi prius* before Lush, J. It was argued *in banc* before Lush, Mellor, and Blackburn, JJ. It was again argued on appeal in the Exchequer Chamber (L. R. 4 Q. B. 379) before Kelly, C. B., Byles, Keating, and Montague Smith, JJ., and Channell and Bramwell, BB.

¹ Jones v. Boyce, 1 Stark. 493.

English Court of Queen's Bench.

ing some distance, while the train was going at great speed, the carriage in which he was riding began to oscillate, then left the rails, and ultimately broke away from the first part of the train and turned over. The plaintiff was very seriously injured. It was also suggested that the train was not brought to a stand-still so soon as it ought. This, however, was conclusively negatived by the defendants' evidence. It was proved on the part of the defendants that the cause of the accident was the giving way of one of the wheels of the carriage in which the plaintiff was. The tire of the wheel had broken into three pieces, owing to a flaw in the welding, caused by an air-bubble. Several witnesses were called, who stated that such a defect would sometimes occur in spite of the greatest care on the part of the manufacturer; that it could not be discovered in the process of manufacture, nor afterwards, either by the eye or from the ringing of the metal. It was further proved that the carriage in question, which belonged to the London and North-Western Company (being used by the defendants in the mutual arrangements of the two companies), had been examined at the usual places, — amongst others, at Trent, — and that the wheel, on hammering, then rang true. The tire was of considerably more than the minimum thickness to which it is found, in practice, safe to wear tires.

The learned judge told the jury that the material question was whether, upon the whole of the evidence, they were of opinion that the defendants were guilty of negligence. If the injury to the plaintiff was properly due to an accident, — that is to say, if it could not reasonably be foreseen, and was not due to any fault or carelessness on the part of the defendants, — the plaintiff was not entitled to recover. The learned judge then pointed out that the evidence given on the part of the plaintiff did not substantiate the charge in the declaration, which he read to them. The evidence for the defendants showed clearly that the accident was caused by the breaking of the tire of the wheel. The fact that the carriage did not belong to the defendants made no difference in their liability. Was there any evidence of negligence on the part of the defendants in not detecting the fault in the wheel? If, as the evidence went to show, the defect in the wheel could not be detected either by the eye or the ear, then there was no negligence on the part of the defendants. The learned judge then went through the evidence as to the impossibility of always preventing such latent flaws in the manufacture, or of detecting them during the process or by subsequent examination. The jury were to say, on the whole evidence, whether they were satisfied that the injury to the plaintiff was due to the neg-

Readhead v. Midland Railway Company.

lect of the defendants, or whether it was not one of those accidents to which all are subject, in which, though injuries arise, no one is chargeable in law for the consequences. If the jury found any fault on the part of the defendants, as a breach of duty on their part which the jury might think the defendants ought reasonably to have performed, then the verdict would be for the plaintiff.

The jury returned a verdict for the defendants.

A rule was obtained for a new trial, on the ground of misdirection of the judge in telling the jury that the defendants were entitled to the verdict if the accident was caused by the latent defect in the tire of the wheel.

June 20, 1866, *Aspinwall*, Q. C., and *Kemplay*, showed cause. — The plaintiff, in order to show that there has been misdirection, must contend that there is an implied warranty on the part of a carrier of passengers that the carriage in which the passenger travels is road-worthy for the journey. There is no authority for such a proposition. *Bremner v. Williams*¹ will be cited by the other side, but the *dictum* of BEST, C. J., that every coach proprietor warrants to the public that his stage-coach is equal to the journey it undertakes, was not necessary to the decision of the case. *Sharp v. Grey*² will also be relied on; but there is a distinction between that case and the present. There, by unscrewing the iron clamps and taking off the wooden frame, the defect in the axletree might have been discovered; but here, by no examination whatever could the defendants have discovered the defect in the tire of the wheel. And it is also to be observed that TINDAL, C. J., in that case directed the jury to consider whether there had been on the part of the defendant that degree of vigilance which was required by his engagement to carry the plaintiff safely; so that that case was decided on the ground of negligence on the part of the carrier. The law on the subject, however, is correctly stated by ALDERSON, J., in his judgment: "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation." The evidence here is that it was impossible to discover the defect until the tire was actually broken. As pointed out by Sir JAMES MANSFIELD in *Christie v. Griggs*,³ there is a distinction between a contract to carry goods and a contract to carry passengers; for the goods the carrier is answerable at all events. He does not warrant the safety of the passengers, but only that as far as human care and foresight will go their safe convey-

¹ 1 Car. & P. 414, 416.

² 9 Bing. 457.

³ 2 Camp. 81.

English Court of Queen's Bench.

ance will be provided for. He is not liable for the consequences of a pure accident. *Grote v. Chester and Holyhead Railway Company*¹ shows that if a competent person is employed to make the tire, and he uses due and reasonable care and employs proper materials in the work, the railway company will not be liable for the defect in the tire which it was impossible to detect, and so prevent the accident. There is a *dictum* of CRESSWELL, J., in *Benett v. Peninsular Steamboat Company*² which may be relied on by the plaintiff, viz., that *Sharp v. Grey*³ lays down the law that a carrier is bound at all events to provide a sound coach. But the learned judge's observation had no direct bearing on the question then before the court.

[BLACKBURN, J. — It was held in *Brown v. Edgington*⁴ that there is an implied warranty that an article furnished by a manufacturer shall be fit and proper for the purpose for which it is supplied.]

Manisty, Q. C., and *T. Jones*, in support of the rule. — The point is new, and the authorities bearing upon it have been already cited. It is clear that the ruling of BEST, C. J., in *Bremner v. Williams*,⁵ and the case of *Sharp v. Grey*,⁶ are direct authorities that there is a warranty on the part of a coach-owner that his coach is fit for the journey. It is a sound rule of law, because the passenger injured thus has his remedy against the company, and the company against the person who supplied the insufficient vehicle. By analogy to the case of the owner of a ship who warrants his ship seaworthy for the voyage, so a carrier of passengers warrants the vehicle roadworthy for the journey.

Cur. adv. vult.

May 15, the following judgments were delivered:—

LUSH, J. — This was an action, tried before me, for an injury caused by the breaking down and overturning of the carriage in which the plaintiff was travelling as a passenger on the defendants' railway. The accident arose from the fracture of one of the wheels of the carriage, the tire of which had split into three pieces, owing, as it was afterwards discovered, to a latent flaw in the welding; and it was proved, on the part of the defendants, that at the commencement of the journey the wheel was to all appearances strong and sound; that such a flaw in the welding may occur without any fault on the part of the manufacturer; that there were no means of detecting it beforehand; and that, in fact, the carriage had been examined, according to ordinary practice, before the train had started on the journey, and had answered to all the usual tests of soundness.

¹ 2 Exch. 251.

² 6 C. B. 782.

³ 9 Bing. 457.

⁴ 2 Man. & G. 279.

⁵ 1 Car. & P. 414.

⁶ 9 Bing. 457.

Readhead v. Midland Railway Company.

I directed the jury that, if they believed this evidence, the defendants were not responsible for the accident; and they accordingly found their verdict for the defendants.

A rule was granted for a new trial, on the ground that a carrier of passengers is bound at his peril to provide a roadworthy carriage, and is consequently liable if the carriage turns out to be defective, notwithstanding that the infirmity was of such a nature that it could neither be guarded against nor discovered.

The question thus nakedly raised is one of vast importance at the present day, both to railway companies and passengers; and there being no case in our reports in which it has been argued and adjudicated, we took time to consider our judgment. Having done so, and given to the subject the best consideration in my power, I adhere to the opinion that the law imposes no such liability on railway companies; though, as my brother BLACKBURN has come to a different conclusion, I express that opinion with some degree of diffidence.

It is not contended that the obligation of a carrier of passengers is coextensive with that of a carrier of goods, who, by the custom of the realm, is placed in the position of an insurer, subject only to the exceptions of loss or damage by "the act of God or the public enemies of the crown." The reasons upon which that liability is based, and which are expressed by HOLT, C. J., in *Coggs v. Bernard*,¹ and by BEST, C. J., in *Riley v. Horne*,² are inapplicable to a carrier of passengers. The latter has not the same control over persons which he has over goods, nor the same opportunities of abuse and misconduct, the apprehension of which gave rise to this rigorous rule of law; and therefore the law has never imposed upon him the responsibility of an insurer. The undertaking of a carrier of passengers, says Dr. Story in his work on *Bailments*,³ is not an undertaking absolutely to "carry safely," but only to exercise "due care and diligence in the performance of his duty." But it is contended that in this particular part of his duty, viz., the providing a suitable vehicle, his undertaking goes beyond the measure of "due care and diligence," and includes a warranty that the carriage which he provides is sound and free from all defects which render it unfit for the service, though he has used every means in his power to make it sound, and though he could not by any amount of care, skill, or vigilance have ascertained that it was not so. The language of Story just quoted does not suggest any such qualification, and surely so important an element in the contract about which he is

¹ 2 Ld. Raym. 909, 918.

² 5 Bing. 217, 220.

³ § 601.

treating would have been noticed by that learned writer if he had supposed it to exist. No such liability is, however, hinted at throughout the work; nor, as I am aware of, in any other text-book. The proposition is one which I cannot adopt without authority; because I can see no reason why a carrier should be held to warrant more than due care and diligence can enable him to perform, as respects the quality of his carriage, when it is admitted that he is under no such liability as respects the conduct or management of it.

We were pressed with what were alleged to be analogous cases of a ship-owner, who is held to warrant the seaworthiness of his vessel, and of a manufacturer of goods ordered for a given purpose, who, it was contended, is held to warrant their fitness and sufficiency for that purpose. As to ship-owners, I agree there is abundant authority for the doctrine laid down; and moreover that there is no distinction, in this respect, between a carrier by water and a carrier by land. But it is to be observed that whenever this particular liability of a ship-owner is mentioned, it has reference to his obligation as the carrier of cargo. In that capacity, he is an insurer of its safe delivery, subject only to the excepted perils. His warranty of seaworthiness, in such a case, springs out of and necessarily results from the absolute duty he has undertaken; and it is not a warranty superadded to, and exceeding the terms and measure of, his contract to carry, as it would be if it were extended to a carrier of passengers. A carrier of goods by land may with equal propriety be said to warrant the roadworthiness of his carriage, because he warrants against every casualty by which the goods might be lost or damaged on the journey.

As regards the second case put, viz., that of the manufacturer who supplies goods to order for a given use or purpose, I do not stop to consider whether the analogy is so complete as the argument assumes it to be, because it does not appear to me that the case mainly relied on, viz., *Brown v. Edgington*,¹ sanctions the doctrine which is sought to be deduced from it. Upon carefully examining the facts there, it will be found that no such question as that we have now to determine arose in the case. The insufficiency of the rope was attributable to causes which imply blame in the manufacturer, viz., to either a want of judgment, or a want of care, or skill, both, or all. The rope was not strong enough for the purpose for which it was known by the defendant to have been required, it having been made of too small a size, or of faulty materials, or been badly put together; and whatever the cause

¹ 2 Man. & G. 279.

Readhead v. Midland Railway Company.

of its failure was, it was one which might have been prevented, and it was assumed by the court, as it was assumed in the case of *Jones v. Bright*,¹ that the manufacturer might, and therefore ought, to have made it sufficient for the purpose. The main contest in the case was whether the defendant was liable, seeing that he was not the manufacturer of the rope, but had procured it from a rope-maker. The question of liability for a hidden, undiscoverable, and unavoidable defect was not present to the mind of any of the judges who decided that case. I cannot, therefore, regard it as an authority to the extent necessary to sustain the plaintiff's argument, nor am I aware of any other case on that point which established such a position.

I do not feel it necessary to review in detail the cases which more directly bear upon the liability of a carrier of passengers. They are quoted by Story as the authorities for the rule which he lays down, and, in my judgment, they do not carry the liability further than he has stated it. In all of them, where it has become necessary to define that liability, the judges have carefully distinguished between a carrier of passengers and a carrier of goods, and have pointedly declared that the liability of the former stands on the ground of negligence alone.² Undoubtedly there are expressions used in some of those cases which, if taken alone, and without reference to the particular facts, favor the argument of the plaintiff. See per Lord ELLENBOROUGH, in *Israel v. Clark*; ³ BEST, C. J., in *Bremner v. Williams*; ⁴ and per GASELEE and BOSANQUET, JJ., in *Sharp v. Grey*.⁵ But reading such expressions as they should be read, in connection with and as applicable to the facts of each case, it is to my mind evident that the learned judges who used them did not intend them to be understood in the sense now imputed to them. The decisions in those cases in which such expressions are used seem to me against the plaintiff, rather than decisions in his favor. In *Sharp v. Grey*,⁶ the case most pressed in the argument by the plaintiff's counsel, as also in the case of *Christie v. Griggs*,⁷ the axletree had, without any external cause to account for it, suddenly snapped. If there was such a warranty as is now insisted on, that warranty had clearly been broken, for the coach had turned out to be not road-worthy. There was, therefore, nothing to go to the jury but the amount of damages; whereas in each case the question was left to the jury whether the defendant was liable as guilty of a want of due

¹ 5 Bing. 533.² See *Aston v. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Camp. 79; *Crofts v. Waterhouse*, 3 Bing. 321.³ 4 Esp. 259.⁴ 1 Car. & P. 416.⁵ 9 Bing. 453.⁶ 9 Bing. 457.⁷ 2 Camp. 79.

English Court of Queen's Bench.

care or not. In *Sharp v. Grey*, the jury found a verdict for the plaintiff, which the court refused to disturb; in *Christie v. Griggs*, they found for the defendant, and no motion appears to have been made to set this verdict aside. Coming down to a more recent period, I find the same doctrines laid down by the LORD CHIEF JUSTICE of this court in *Stokes v. Eastern Counties Railway Company*.¹ That was a case exactly similar to the present. The wheel had broken from a latent flaw in the welding, and great injury had been done to several passengers. After a very lengthened trial, the jury found a verdict for the defendants; and although the plaintiff in that case, and many other persons, were deeply interested in questioning the ruling of the LORD CHIEF JUSTICE, no attempt was made to set aside the verdict.

As far, therefore, as the authorities in this country go, they are against the position taken by the plaintiff; and considering that many such accidents have occurred since the introduction of railways, the fact that this is the first time so extensive a liability has been insisted on argues a general impression against it. But though the question has not before been presented for solemn adjudication in this country, it has been raised more than once in the courts of the United States, and in every case the judgment has been in favor of the carrier. In *Ingalls v. Bills*,² the court delivered an elaborate judgment, reviewing all the authorities, English and American, and affirming the doctrine that a carrier of passengers is liable only for negligence.

For these reasons, I am of opinion that the rule must be discharged.

MELLOR, J. — In this case the plaintiff, being a passenger on the line of defendants' railway, sustained an injury by the breaking of one of the wheel-tires of the carriage in which he was travelling, owing to a latent defect in its construction, not discoverable by the most careful examination.

My brother LUSH, who presided at the trial, in leaving the case to the jury, told them that a carrier of passengers for hire was bound to use the utmost care, skill, and diligence in every thing that concerned the safety of passengers; but that if the injury was due to a hidden defect in the carriage, which the utmost care and skill could not discover, the defendants were not responsible. I have come to the conclusion that such a direction was right, and that the rule for a new trial must be discharged.

The propriety of that direction depends upon the nature and extent

¹ 2 Fost. & Fin. 691.

² 9 Metc. 1, cited in the 7th ed. of Story on Bail. 565.

Readhead v. Midland Railway Company.

of the liability which a carrier of passengers for hire undertakes with regard to each passenger.

The responsibility, both of common carriers of goods for hire and of common carriers of passengers for hire, notwithstanding some important differences between them, rests for its foundation upon the general custom of the realm; in other words, upon the common law; and the liability of each class of carriers (where it is not affected by some special contract) arises from a duty implied by law, although the law will raise a contract as springing from that duty.¹ Until the time of *Dale v. Hall*,² it seems to have been the usual mode to declare against common carriers, either of goods or passengers, setting forth the custom of the realm; when it was supplanted by the modern mode of declaring either in case for breach of duty, or on the contract arising out of the duty so implied by law. In *Coggs v. Bernard*,³ Lord Holt, in defining his fifth sort of bailment, says, first, "if it [the delivery of goods] be to a person of the first sort, [that is, one who exercises a public employment] and he is to have a reward, he is bound to answer for the goods at all events; and this is the case of the common carrier, common hoyman, master of a ship, etc. * * * The law charges this person, thus intrusted to carry goods, against all events but acts of God and the enemies of the king. For though the force be never so great, as if an unreasonable number of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And *this is the reason the law is founded upon in that point.*" And in the case of *Riley v. Horne*,⁴ Chief Justice BEST, in treating upon the same subject, said: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's ser-

¹ *Bretherton v. Wood*, 3 Brod. & B. 54; *Ansell v. Waterhouse*, 6 Mau. & Sel. 385.

² 1 Wils. 281.

³ 2 Ld. Raym. 918; 1 Smith's Ld. Cas. (6th ed.) 189.

⁴ 5 Bing. 220.

English Court of Queen's Bench.

vants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for reward, *namely, that of taking all reasonable care of it*, the responsibility of an *insurer*." This judgment is cited with approbation by Mr. Justice Story,¹ and, as far as I am aware, has been generally considered truly to express the reasons upon which the policy of the law with regard to common carriers of goods has been founded. The liability of a common carrier of goods is therefore that of an insurer, arising out of the policy of the law, which superadds such a responsibility to that springing merely out of a contract to carry for reward, viz., "*the taking all reasonable care of the goods delivered to be carried.*"

The policy of the law with regard to common carriers of goods for hire, and the reasons assigned for it by Lord Holt and Chief Justice Best, appear to have no application to the case of carriers of passengers for hire; and hence by one writer on the subject it has been stated that "a stage-coach owner who carries passengers only is not, properly speaking, a common carrier; he does not warrant the safety of the passengers at all events, but only that, so far as human care and foresight will go, their safe conveyance will be provided for."²

We have, however, seen that his liability, like that of the carrier of goods, arises out of the duty implied by law, and that the declaration may be either in case for the breach of such duty, or on the contract springing from it, as was said by HOLROYD, J., in the case of *Ansell v. Waterhouse*:³ "It seems to me, therefore, that although the law will raise a contract with a common carrier to be answerable *for the careful conveyance of his passenger*, nevertheless he may be charged in an action upon the case for a breach of his duty." Does, then, the law, in the case of a carrier of passengers for hire, superadd any liability beyond that of providing for "*the careful conveyance of his passengers*"?

In *Crofts v. Waterhouse*,⁴ which was an action against a stage-coach proprietor by a passenger injured by the overset of the coach, BEST, C. J., said: "This action cannot be maintained unless *negligence* be proved. * * * The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also

¹ Story on Bail., § 491.² Smith's Merc. Law (7th ed.), 232.³ 6 Mau. & Sel. 393.⁴ 3 Bing. 319, 321.

Readhead v. Midland Railway Company.

with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens. But with all these things, and when every thing has been done that human prudence can suggest for the security of the passengers, an accident may happen. * * * If, having exerted proper skill and care, he from accident gets off the road, the proprietors are not answerable for what happens from his doing so." And PARK, J., in the same case, said: "A carrier of goods is liable in all events except the act of God or the king's enemies. A carrier of passengers is *only liable for negligence*." So, in *Aston v. Heaven*,¹ it was contended that coach-owners were liable in all cases except where the injury happens from the act of God or the king's enemies; but EYRE, C. J., held that cases of loss of goods by carriers were totally unlike the case before him. In those cases the parties are protected, but as against carriers of persons, the action stands on the ground of negligence alone. In *Christie v. Griggs*,² in which the accident arose from the breaking of an axletree, Sir JAMES MANSFIELD said: "If the axletree was sound as far as the human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable at all events; but he did not warrant the safety of passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered."

Thus we see that the test in case of a carrier of passengers is, has he, "as far as human foresight can go, provided for their safe conveyance"? Of course this includes care and foresight in the making and procuring, as well as in using, the carriage.

In the case of *Grote v. Chester and Holyhead Railway Company*,³ where *Sharp v. Grey*,⁴ to which I shall presently refer, was cited for the opinion of ALDERSON, J., that "a coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation," PARKE, B.,⁵ remarked: "In that case the coach proprietor is liable for an accident which arises from an imperfection in the vehicle,

¹ 2 Esp. 533.² 2 Camp. 81.³ 2 Exch. 255.⁴ 9 Bing. 457.⁵ [Mr. Justice Mellor is in error at this point. The language which he quotes is

that of Sir James Allan Park, a justice of the Court of Common Pleas, and not Sir James Parke, a baron of the Court of Exchequer, afterwards elevated to the peerage under the title of Wensleydale.—Ed.]

English Court of Queen's Bench.

although he has employed a clever and competent coachmaker." Lord WENSLEYDALE, by that observation, merely intended to express that a coach proprietor could not shelter himself from the consequences of using an unsafe coach by the fact that he had employed a competent coachmaker to make it; which differs materially from implying a warranty against a defect which no amount of care or skill could discover.

The case of *Burns v. Cork and Bandon Railway Company*¹ comes the nearest in its facts to the present. In that case, in answer to an action for not carrying a passenger safely, it was specially pleaded, in substance, that, whilst he was being carried in a carriage on the defendants' railway, a fracture occurred in a crank-pin in one of the leading wheels of the locomotive engine, which was occasioned by an original defect in the material and construction of such crank-pin, which defect, before the fracture occurred, was not capable of being detected by the defendants upon due or proper examination or observation, and that the crank was purchased with the locomotive engine, in due course of business, from competent manufacturers, and was not made by the defendants, and that before the commencement of the journey the defendants duly examined the said engine and crank-pin, and had not any notice of the defect in the same. To this plea the plaintiff demurred; and Chief Baron PIGOT, in delivering the opinion of the court, stated the question to be whether, taking all the averments in the plea together, the defendants had stated facts which exempted them from liability for the breach of contract admitted by the plea. He then proceeded: "I am of opinion they have not, according to the existing state of the authorities. Although a carrier of passengers does not warrant the safety or the due arrival of his passengers, yet I consider that he must be considered as warranting that the vehicle in which he conveys them is, at the time of the commencement of the journey, free from all defects, at least as far as human care and foresight can provide, and perfectly roadworthy." He then refers to *Christie v. Griggs*,² *Sharp v. Grey*,³ and *Grote v. Chester and Holyhead Railway Company*,⁴ and proceeds as follows: "But, applying Sir J. MANSFIELD's test, have they shown in their plea that, as far as human care and foresight could go, they provided for the safety of their passengers? I think they have not. Their plea does not contain any averment as to the care and skill applied to the manufacture of the engine, or as to the care or skill exercised by them in the selection or inspection of it. All the averments in their pleas are quite consistent

¹ Irish Rep. 13 C. L. 543.² 2 Camp. 79.³ 9 Bing. 457.⁴ 2 Exch. 251.

Readhead v. Midland Railway Company.

with gross and culpable carelessness on the part of the manufacturers, and with gross and culpable negligence on their part in the purchase of it from the manufacturers. If they had been the manufacturers of the engine, they would have been bound to aver and prove that due care and skill had been exercised in the process of its manufacture. Are they to be relieved from legal liability because they allege that they have purchased it from a competent manufacturer? I think that would be a distinction dangerous to the public, and that, as ALDERSON, J., says, railway companies might buy ill-constructed or unsafe vehicles and the public be without remedy."

Now, although one or two ambiguous phrases are used by the CHIEF BARON in his judgment, arising out of some error in the collocation of the words, he never intended, as it appears to me, to assert that there existed an implied warranty against latent defects which no amount of skill or care could have discovered; otherwise I should have expected it to have been at once so expressed, which would have rendered further reasons unnecessary. I think that the course of the argument and of the judgment show that the discussion really turned upon the question of negligence, and not of warranty.

The authorities to which I have referred sufficiently illustrate the distinction between the liability of carriers of goods and that of carriers of passengers. The liability of the former is that of an *insurer*, whilst that of the latter is *only* for *negligence*. It further appears from these cases that the negligence which renders a carrier of passengers liable is something which might have been avoided by the exercise of care, skill, or foresight, and that an accident which results from some cause which no amount of care, skill, or foresight could have discovered cannot be said to be the result of negligence in the carrier.

In the case of carriers by water the same distinctions hold, so far as I am aware. In *Lyon v. Mells*,¹ Lord ELLENBOROUGH said: "In every contract for the carriage of goods, between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight, and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so. The law presumes a promise to that effect, without actual proof, and every reason of sound policy and public con-

¹ 5 East, 428, 437.

English Court of Queen's Bench.

venience requires it should be so." There are many authorities to the same effect, which it is not necessary to cite.

If it be said that it is a strange thing that a warranty of seaworthiness should be *implied by law* in the case of goods, and not of passengers, I can only answer that in case of goods the warranty of seaworthiness is incidental to the liability of the carrier *as an insurer*. In *Coggs v. Bernard*,¹ Lord HOLT makes no distinction in this respect between carriers by land and carriers by water, and many of the reasons stated by him and BEST, C. J.,² to be the foundation of the liability of a carrier of goods by land apply with equal force to the carrier of goods by water; and certainly in no case, so far as I am aware, has there been a suggestion that the foundation of the liability of a carrier of passengers by water depends upon other considerations than those which regulate the liability of carriers of passengers by land.

In the present case the direction of my brother LUSH to the jury appears to me to have been unexceptionable, and in strict conformity with the cases above referred to. The fracture of the wheel-tire, by itself, and unexplained, might have been sufficient to raise a presumption of negligence against the defendants.³ But upon the direction of my brother LUSH, when the explanatory evidence had been given, it must be taken to have been in fact found by the jury that the breaking of the wheel-tire *was due to a hidden defect which no amount of care or skill could have discovered, either in the manufacture, purchase, or use*. I was at one time in doubt whether the principles applied and explained in the case of *Brown v. Edgington*,⁴ said by PARKE, B., in *Sutton v. Temple*,⁵ "to be long-settled law," did not govern this case; but I am now satisfied that they do not. In that case, although the "*scienter*, or guilty knowledge," as it was termed, was negatived by the jury, there was nothing to prove that the insufficiency of the rope might not have been discovered upon a careful examination; and I can find nothing to show that the doctrine now contended for was in the minds of the judges who decided it. If the liability of a carrier of passengers for hire springs from the custom of the realm, or from an actual contract made, why are we to imply a warranty as to the *absolute sufficiency of the carriage*, when we do not imply any such warranty with regard to the other incidents of the journey? It would appear to be quite as reasonable to imply a warranty against accidents as against a hidden

¹ 2 Ld. Raym. 909, 918.

² In *Riley v. Horne*, 5 Blng. 220.

³ *Skinner v. London etc. R. Co.*, 5 Exch. 787; *Carpne v. London etc. R. Co.*, 5 Q. B.

747; *Bird v. Great Northern R. Co.*, 28 L. J. (Exch.) 3.

⁴ 2 Man. & G. 279.

⁵ 12 Mee. & W. 64.

Readhead v. Midland Railway Company.

defect which no amount of skill or care could discover. I think that it would be extremely dangerous, and somewhat inconsistent, to extend the doctrine of implied warranty *beyond the possible means of the alleged warrantor to guard against the defects to which his warranty is supposed to extend.*

The cases cited in support of the plaintiff's right to recover do not, I think, when examined, go the length attributed to them; and they are neither so consistent nor precise as to conclude us from exercising our own judgment upon the facts before us; and, notwithstanding some expressions attributed to Lord ELLENBOROUGH, and BEST, C. J., I cannot but think that those learned judges had not present in their minds the idea that there existed in the case of carriers of passengers any *absolute* warranty of roadworthiness. In *Israel v. Clark*,¹ where the injury arose from the breaking of an axletree, the expressions used by Lord ELLENBOROUGH are very wide, viz., that "he should expect a clear landworthiness in the carriage itself to be established." Still, it is by no means certain that he had in view a case of latent defect which no skill or care could discover. No opinion was expressed showing whether he considered that the cause of action rested upon negligence or upon the doctrine of implied warranty.

In *Bremner v. Williams*,² BEST, C. J., is reported to have said "that every coach proprietor warrants that his stage-coach is equal to the journey it undertakes," and "*it is his duty to examine it previous to the commencement of every journey.*" The latter words show to what matters he supposed the warranty to extend; and I think that it is only fair, considering the opinions already cited from other cases, in which, with more consideration, he had treated this subject, to assume that he did not refer to *latent* defects which could not be discovered on *examination*.

The decision which was most discussed before us is the case of *Sharp v. Grey*,³ but I am bound to say that, although the opinions expressed by GASELEE, J., and BOSANQUET, J., in that case are apparently in antagonism to the direction given by my brother LUSH, it is not very easy to see that the judges who decided it had in their minds a case of latent defect not discoverable by any amount of care or skill, or that they were unanimous in laying down any clear or precise rule of law which ought to govern us in this case; and it is to be observed that the CHIEF JUSTICE, TINDAL, left the case to the jury as a *question of fact*, although in somewhat loose and general terms, viz., "whether there had been on the part of the defendant that *degree* of vigilance which was required by his

¹ 4 Esp. 259.² 1 Car. & P. 414.³ 9 Bing. 457.

English Court of Queen's Bench.

engagement to carry the plaintiff safely." And PARK, J., is reported to have said "it was a *question of fact for the jury*." And ALDERSON, J., limits the extent of any implied warranty against defects to those "which could be seen at the time of construction." He adds: "And if the defendant were not responsible, a coach proprietor might *buy ill-constructed or unsafe vehicles* and his passengers be without remedy."

There are several modern cases not referred to on the argument, which show that the judges who tried them considered the action against carriers of passengers for hire to be founded on negligence. In *Stokes v. Eastern Counties Railway Company*,¹ Chief Justice COCKBURN thus expressed himself: "You are entitled to expect at the hands of a railway company all that skill, care, and prudence can do to protect the public against danger and accidents, but you must carry that principle into application as reasonable men. * * * If you are of opinion that the flaw or crack had become *visible* prior to the accident; that upon careful examination — not with the aid of scientific authorities and scientific instruments, but on an *ordinary, reasonably proper, and careful* examination, such as all feel ought to be made before the engines are used, on which the safety of a whole train might depend — this flaw might have been discovered; and that either the examination did *not* take place, or if it did, and the flaw was discovered, but the man, with careless disregard of his own safety and of others whose lives and limbs might be involved, treated all this with supine and reckless indifference, then undoubtedly there is negligence established, for which the company are and ought to be responsible."

That case is important, because the verdict was for the defendants, and if the doctrine now contended for by the plaintiff be the correct exposition of the law, the verdict in that case, if questioned, must have been set aside.

Again, in *Ford v. London and South-Western Railway Company*,² Chief Justice ERLE, in summing up the case to the jury, said: "The action is grounded on negligence. The railway company is bound to take reasonable care, to use the best precautions in known practical use for securing the safety and convenience of the passengers."³

In this state of the authorities in our own courts and in Ireland, we are much assisted in arriving at a conclusion by several cases decided in the courts of the United States, cited in a note to the seventh edition of *Story on Bailments*, p. 565. In *Ingalls v. Bills*,⁴ the late Mr. Justice

¹ 2 *Fost. & Fin.* 691, 693, 694.

² *Id.* 732.

³ See also *Pym v. Great Northern R. Co.*,

² *Fost. & Fin.* 621, per Chief Justice Cockburn, to the same effect.

⁴ 9 *Metc.* 1, 15; *ante*, p. 123.

Readhead v. Midland Railway Company.

HUBBARD, in a very able judgment, in which the English and American authorities are reviewed, states it to be the conclusion of the court, "That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of it, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense." This extract from the judgment of Mr. Justice HUBBARD, in my opinion, truly expresses the rule of law applicable to the present case, and is in strict conformity with my brother LUSH's direction to the jury; and were it not for the opinion of my brother BLACKBURN to the contrary, I should have considered that it was supported by the *weight* of English authority.

As the majority of the court are in favor of the defendants, and think my brother LUSH's direction right, the rule obtained by the plaintiff will be discharged.

BLACKBURN, J. — This was an action brought by a passenger on the defendants' railway, to recover damages for an injury he had received, owing to the breaking down of the carriage in which he was travelling.

On the trial before my brother LUSH, it appeared that the carriage was one belonging to the London and North-Western Railway Company, which had been for some time in use by them, and had come into the possession of the defendants in the ordinary course of traffic, and was (according to the ordinary arrangements between the different railway companies) used by the defendants till they could return it.

Evidence was given that when the carriage was put into the train by the defendants it was to all outward appearance reasonably sufficient for the journey, the tire of the wheel being of proper thickness and apparently of sufficient strength, but that, in fact, there had been an air-bubble in the welding, which rendered the tire much weaker than it appeared; so that, in fact, it was not reasonably fit for the journey, and that the breaking of this tire occasioned the accident. Evidence

English Court of Queen's Bench.

was given that this defect was one which could not be detected by inspection, nor by any of the usual tests, as it would ring to the hammer as if perfectly welded; and that there was no neglect on the part of the defendants or their servants, who took every reasonable precaution in examining the carriage.

My brother LUSH left the case to the jury, telling them that if the accident was occasioned by any neglect on the part of the defendants, they should find for the plaintiff, but that if it was occasioned by a latent defect in the wheel, such that no care or skill on the part of the defendants could detect it, the verdict should be for the defendants. The jury found for the defendants; and it is not disputed that, if the direction was right, their verdict was justified by the evidence.

A rule *nisi* was obtained for a new trial, on the ground of misdirection, as it was contended that the defendants, as carriers of passengers, were bound at their peril to supply a carriage that really was reasonably fit for the journey, and that it was not enough that they made every reasonable effort to secure that it was so; in other words, that the obligation of the carrier to the passenger was equivalent to a warranty of the reasonable sufficiency of the vehicle he supplies. Cause was shown in the Sittings after Trinity Term, 1866, before my brothers MELLOR, LUSH, and myself, when the court took time to consider.

This is a question of very great nicety and importance; but, after some consideration and doubt, I have come to the conclusion that on the balance of English authority, and I think, upon the whole, in principle and by analogy to other cases, there is a duty on the carrier to the extent that he is bound at his peril to supply a vehicle in fact reasonably sufficient for the purpose, and is responsible for the consequences of his failure to do so, though occasioned by a latent defect; and therefore that the direction was wrong, and that there should be a new trial. I have come to this conclusion with much doubt and hesitation; and as my two brothers are of different opinion, I need not say that I am very far from being confident that I am not wrong; but still I think it best to state the reasons why I differ from them. I quite agree that the carrier of passengers is not, like the carrier of goods, an insurer, who undertakes to carry safely at all events unless prevented by excepted perils. The carrier has not the control of the human beings whom he carries to the same extent as he has the control of goods, and therefore it would be unjust to impose on him the same responsibility for their safe conveyance. In order, therefore, to render the carrier of passengers liable for an accident, it is necessary to allege and prove that the accident arose from some neglect of duty on the

Readhead v. Midland Railway Company.

carrier's part; but if the obligation on the part of the carrier to provide a vehicle reasonably fit for the journey is absolute, a failure on his part to fulfil that obligation is quite enough to make him liable for all the consequences. And I own I see nothing to diminish the obligation to provide a reasonably safe vehicle, in the fact that it is to be provided for the safety of life and limb and not merely of property.

The carrier supplies and selects the carriage for the purpose of conveying the passenger, who is obliged to trust entirely to the carrier; the passenger having no means of examining the carriage, and no voice in the selection of it. Now, it has been decided that one who contracts to supply articles for a particular purpose, does impliedly warrant that the articles he supplies are fit for that purpose.¹ The principle of that case, as I understand it, is that expressed by MAULE, J., who says that the defendant, having accepted an order for a rope for a particular purpose, which rope he was to select and procure, did undertake to furnish one fit for that purpose, and was therefore liable as on a breach of his contract if he furnished one unfit for that purpose, though that unfitness arose from a latent defect; and this principle would seem to apply to the carrier of passengers who supplies a vehicle. On the same principle, I think, it is that a ship-owner warrants to the person who ships goods that his vessel is seaworthy. Lord TENTERDEN, in *Abbott on Shipping*,² states the law thus: "The first duty is to provide a vessel tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage. For if the merchant suffer loss or damage by reason of any insufficiency of these particulars at the outset of the voyage, he will be entitled to a recompense. * * * An insufficiency in the furniture of the ship cannot easily be unknown to the master or owner, but in the body of the vessel there may be latent defects unknown to both. The French ordinance directs that if the merchant can prove that the vessel, at the time of sailing, was incapable of performing the voyage, the master shall lose his freight and pay the merchant his damages and interest.³ Valin, in his commentary on this article, cites an observation of Weytsin:⁴ 'That the punishment in this case ought not to be thought too severe, because the master, by the nature of the contract of affreightment, is necessarily held to warrant that the ship is good, and perfectly in a condition to perform the voyage in question, under the penalty of all expenses, damages, and interest.' And he himself adds that this is so, although before its departure the ship may have been visited, according to the practice in France, and

¹ *Brown v. Edgington*, 2 Man. & G. 279, 293.

² 5th ed., p. 218; 10th ed., by Shee, p. 254.

³ Ord. de la Marine, liv. iii., tit. 3, art. 12.

⁴ *Traité des Avaries*, 10.

English Court of Queen's Bench.

reported sufficient; because on the visit the exterior parts only of the vessel are surveyed, so that secret faults cannot be discovered, 'for which by consequence,' says he, 'the owner or master remains always responsible, and this more justly because he cannot be ignorant of the bad state of the ship; but even if he be ignorant, he must still answer, being necessarily bound to furnish a ship good and capable of the voyage.''' Lord TENTERDEN then notices the opinion of Pothier,¹ that in such a case the owner should not be answerable for damages occasioned by a defect which they did not nor could know, though he agreed that they should lose their freight; and Lord TENTERDEN observes in a note that this opinion of Pothier is not quite consistent with his own principles, laid down in the *Traité de Louge*.² However this may be in the old French law or the civil law, it is, I think, clear that, according to English law, either there is a breach of warranty, in which case the owner is responsible for all the consequences, or there is not, in which case there is no ground for depriving him of his freight. And I think that there is ample authority, in addition to what I have cited from *Abbott on Shipping*, for saying that, by English law, such a warranty is implied where the carriage is by water.

In *Lyon v. Mells*,³ Lord ELLENBOROUGH, in delivering the considered judgment of the court, says: "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight, and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so. The law presumes a promise to that effect on the part of the carrier, without any actual proof, and every reason of sound policy and public convenience requires that it should be so. The declaration here states such a promise to have been made by the defendant, and it is proved by proving the nature of his employment; or, in other words, the law in such a case, without proof, implies it."

In *Gibson v. Small*,⁴ in explaining the reason why, in a voyage policy of insurance, there was an implied condition that the ship was seaworthy, as much when the insurance is on goods as when on the vessel, PARKE, B., says: The ship-owner "contracts with every shipper of goods that he will do so" (*i.e.*, make the ship seaworthy). "The shipper of goods

¹ *Traité de Charte-partie*, num. 30.³ 5 East, 428, 437.² Part II., chap. 1, § 4, par. 2.⁴ 4 II. L. Cas. 404.

Readhead v. Midland Railway Company.

has a right to expect a seaworthy ship, and may sue the ship-owner if it is not. Hence, the usual course being that the assured can and may secure the seaworthiness of the ship, either directly if he is the owner, or indirectly if he is the shipper, it is by no means unreasonable to imply such a contract in a policy on a ship on a voyage, and so the law most clearly has implied it." It appears from this that this most learned judge thought it clear that the undertaking of the ship-owner to the shipper of goods, as to seaworthiness, is coextensive with the undertaking of the goods-owner to his insurer.

I am certainly not aware of any case in which the question has arisen whether there is a similar warranty between a ship-owner and a passenger; but it seems to me that every reason that can be urged in favor of the warranty applies as much to the one case as to the other. The passenger trusts to the ship-owner to select a proper ship as much as the shipper of goods does; and all those circumstances exist which induced Valin (in the passage cited in *Abbott on Shipping*) to say that the ship-owner, from the nature of his contract, was "necessarily bound to furnish a ship good and sufficient for the voyage;" or, as Lord ELLENBOROUGH says in *Lyon v. Mells*,¹ "that his promise to do so is proved by proving the nature of his employment." Indeed, in the very probable case of a person shipping merchandise by the same vessel in which he himself takes his passage, it would seem rather extraordinary if the law were to hold that, as far as the goods were concerned, there was an implied undertaking to furnish a seaworthy ship, but as regarded the personal safety of the passenger there was none. It is true that the carrier of goods is an insurer, except against certain excepted perils, and that the carrier of passengers is not; but the question whether the carrier of goods is bound at his peril to supply a seaworthy vessel can only arise where the immediate cause of the loss is an excepted peril, or where for some other reason the contract to insure does not apply.

Assuming, then, that there is such a warranty implied where the carriage is to be by water, is there any difference where the carriage is by land?

The principle which I understand to be laid down in *Brown v. Edgington*² is this, that where one party to a contract engages to select and supply an article for a particular purpose, and the other party has nothing to do with the selection, but relies entirely upon the party who supplies it, it is to be taken as part of the contract implied by law, that the supply warrants the reasonable sufficiency of the

¹ 5 East, 437.

² 2 Man. & G. 279.

 English Court of Queen's Bench.

article for that purpose, and I think *Lyon v. Mells*¹ lays down a very similar principle as generally applicable, though the particular instance was that of a lighterman. If this principle be a general one, it applies equally to the case of the ship-owner supplying a ship, and the carrier by land supplying a vehicle, whether it is supplied for the carriage of goods or passengers. In *Brass v. Maitland*² this principle was much discussed. I think the effect of the reasoning of the judgment of Lord CAMPBELL and WIGHTMAN, J., shows that, in their opinion, this is a general principle of law; whilst the effect of the judgment of CROMPTON, J., is such as to show that he did not think the principle general, and was not inclined to carry it further than the decisions had already gone. My respect for his opinion is very great, and if ever the question whether there is such a general principle of law should come before me in a court of error, I should endeavor to consider it carefully as an open question, without being too much biased by my present impression in favor of it; but sitting here, in the same court in which that case was decided, I am bound to consider the decision of the majority right, and to act upon it so far as it bears on the present question.

The authorities on the very point now before us are not numerous. In *Israel v. Clark*,³ Lord ELLENBOROUGH is reported to have said that the carriers of passengers by land "were bound by law to provide a sufficient carriage for the safe conveyance of the public who had occasion to travel by them; at all events, he would expect a clear landworthiness in the carriage itself to be established." This seems to show that in his opinion the doctrine which in *Lyon v. Mells*⁴ was laid down as to the persons furnishing lighters for the conveyance of goods, was applicable to those furnishing carriages by land for the conveyance of passengers, and that they were bound at their peril to provide vehicles in fact reasonably sufficient for the purpose. And in *Bremner v. Williams*,⁵ BEST, C. J., is reported to have ruled the same way. These are, it is true, only *nisi prius* decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated or that the opinion of the judge was rightly understood.

On the other hand, in *Christie v. Griggs*,⁶ MANSFIELD, C. J., told the jury that "if the axletree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a

¹ 5 East, 423.² 6 El. & Bl. 470; 26 L. J. (Q. B.) 49.³ 4 Esp. 259.⁴ 5 East, 423.⁵ 1 Car. & P. 414.⁶ 2 Camp. 81, *post*, p. 181.

Readhead v. Midland Railway Company.

contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking as to them went no further than this: that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the carriage was purely accidental, the plaintiff had no remedy for the misfortune he had encountered." We may depend on the accuracy of this reporter. MANSFIELD, C. J., here does not very accurately distinguish between the possible view of the case that the misfortune might have arisen though the vehicle was reasonably fit for the journey, and so be purely accidental, and the possible view that the accident, and the circumstances attending it, showed that the coach could not in fact be reasonably fit for the journey; but, on the whole, I think it must be taken that he thought there was no warranty such as would make the coach proprietor liable for a latent defect in the coach. But this was only an opinion at *nisi prius*.

In *Sharp v. Grey*,¹ TINDAL, C. J., is stated, in the report in Bingham,² to have directed the jury to consider whether there had been on the part of the defendant that degree of vigilance which was required by his engagement to carry the plaintiff safely; which leaves it in doubt whether he told the jury that the defendant was bound at his peril to provide a fit vehicle, a failure to fulfil which duty would be properly described in the declaration as negligence, and left it to them to say if it was in fact reasonably fit; or whether he left it to the jury to say whether the defendant had not neglected some reasonably practical means of ascertaining its fitness; but the counsel, in moving for a new trial, treat it as a direction that the defendant would be responsible though he had conducted his business with all the caution that could be reasonably required; and the judges, in refusing the rule, all appear to have so understood the ruling, and to hold it right.

I have already said that on the balance of reasoning I am inclined to think that such ought to be the law; but at present, sitting in a court

¹ 9 Bing. 457.

² The case is also reported in 2 Moo. & S. 620, with some material differences, and in 2 L. J. (C. P.) 45, with so strong a similarity as to amount to identity with the report in 9 Bing.; the marginal note, statement of facts, as well as the judgments of Park and Alderson, JJ., being almost *totidem verbis*. It is, however, remarkable that the judgments of Gaselee and Bosanquet, JJ., are omitted. In the report in 2 Moo. & Scott, the cause of action is said to have

been laid as negligence in not providing a safe carriage; and the Chief Justice's direction to the jury is, "that the defendant was bound to provide a *safe* conveyance for the passengers he contracted to carry; and he left it to the jury to say whether or not the defendant had observed that extreme degree of care and diligence in the examination of his coach which the safety of his passengers required that he should observe." The judgments also differ considerably from the report in 9 Bingham.

English Court of Queen's Bench.

of coördinate jurisdiction with the Common Pleas, I think it enough that the decision is in point.

In an American case, *Ingalls v. Bills*,¹ given at length in the editor's note to *Story on Bailments*,² the court, after considering the English cases, came to a conclusion opposite to that which I have come to, expressly stating that they do not agree with the opinion of the Court of Common Pleas in *Sharp v. Grey*, if it is understood as I think it must be. It will be very fit, if the case at bar is taken into a court of error, that the reasoning of the American court should be carefully and respectfully considered; and if it appear to the court of error satisfactory, they may act upon it, and overrule the case of *Sharp v. Grey*. But it is clear that we, in the Court of Queen's Bench, cannot treat the American decision as an authority to be placed on the same footing as the decision of the Court of Common Pleas.

The judgment of this case has been delayed until the argument in the case of *Hando v. London, Chatham, and Dover Railway Company* was heard, as it was anticipated that a similar point might arise in that case; but it was not necessary to decide it.³

I think that the Irish case of *Burns v. Cork and Bandon Railway Company*⁴ really throws no light upon the point before us. In that case a plea was pleaded which was clearly intended to raise the very

¹ 9 Metc. 1, ante, p. 112.

² § 592 (7th ed.), p. 565.

³ *Hando v. London etc. R. Co.* (Q. B., May 6, 1867) was an action by a wife to recover damages for the death of her husband. The deceased was killed by an accident which occurred while he was travelling in a carriage on the defendants' railway. The engine and train ran off the rails, and after the accident a spring of the engine was found broken, the fracture being quite fresh. Unless this breaking caused the engine to leave the rails, there was no evidence of the cause of the accident. The engine had been carefully examined before starting. At the time of the accident the deceased was a workman at gas-works which the defendants were empowered by act of Parliament to keep up for their own use, and they had works at Battersea and Dover. The deceased was in the regular employ of the defendants, and it was part of his ordinary duty to go from one set of works to the other, as occasion required, about once a fortnight. He travelled by the defendants' railway free, and received one shilling for his extra expenses. He was so travelling on the occasion of his death. Cockburn, C. J., before

whom the cause was tried, directed a verdict for the defendants; and a rule having been obtained, pursuant to leave reserved, to enter it for the plaintiff, Pollock, Q. C., showed cause, and maintained, *first*, that as there was no negligence shown, but the contrary, the defendants were not liable: for that carriers of passengers did not warrant the safety of their passengers; and he cited most of the cases noticed in the judgments in the principal case; *secondly*, that even if the defendants would have been liable had the deceased been an ordinary passenger, the relation of master and servant existed between him and the defendants, and the injury occurred in the ordinary course of his duty. Powell, Q. C., and Prentice, Q. C., in support of the rule, were heard on the latter point only. The court (Cockburn, C. J., Blackburn, Mellor, and Lush, JJ.) were clearly of opinion that the case was not distinguishable from *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149; *Feltham v. England*, L. R. 2 Q. B. 33; and *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291, and discharged the rule.

⁴ Irish Rep. 13 C. L. (N. S.) 543.

Readhead v. Midland Railway Company.

point before us, and which I own I should myself have thought did raise it. The Irish Court of Exchequer, in giving judgment against the plea, say that if there is a warranty, the plea was clearly bad; and that even if there was only a duty to take every care, the plea did not sufficiently show the fulfilment of that duty, and was therefore bad. Probably the court were not agreed on the question, and intended to avoid expressing any opinion on it; though I should rather conjecture, from the language used, that the learned judge who wrote the judgment inclined to the opinion that there was a warranty.

I have only to add that I do not think that the duty to supply a seaworthy ship or a sufficient vehicle by land is equivalent to a duty to provide one perfect, and such as never can, without some extraordinary peril, break down, which would have the effect of making the carrier an insurer against all losses arising from any failure in the vehicle which cannot be shown to arise from some unusual accident.

I had occasion, in the case of *Burges v. Wickham*,¹ to consider what was the meaning of the term "seaworthy," as applied to a ship; and I see no reason to change the opinion which I then expressed, that it meant no more than that degree of fitness which it would be usual and prudent to require at the commencement of the adventure; and, applying a similar principle to a land journey, I agree with what I understand to have been the direction of ERLE, C. J., in *Ford v. London and South-Western Railway Company*,² that the railway company are not bound to have a carriage made in the best of all possible ways, but sufficiently fulfilled their duty by providing a carriage such as was found in practical use to be sufficient. In other words, I understand the obligation to be to furnish, not a perfect vehicle, but one reasonably sufficient. But in the present case the carriage was not such as to be reasonably sufficient. Had the parties who sent it out known of the existence of this defect in the tire, there would have been strong ground for accusing them of manslaughter if death had ensued. They did not know it, and could not discover it until the tire broke; and they are therefore free from all moral blame or criminal responsibility. The question, therefore, is distinctly raised, whether the obligation of the carrier of passengers to the passenger is merely to take every precaution to procure a vehicle reasonably sufficient for the service, whether by sea or by land, in which case the direction was right; or whether it is, as I think, an absolute obligation, at his peril, to supply one, or be responsible for any damage resulting from a defect.

¹ 3 Best & S. 669, 693; 33 L. J. (Q. B.) 17, 26.

² 2 Fost. & Fin. 730.

English Court of Exchequer Chamber.

Taking the view of the law which I do, I think the rule for a new trial ought to be made absolute; but the majority of the court being of a different opinion, it must be discharged.

Rule discharged.

Against this judgment an appeal was taken to the Exchequer Chamber, where, after the case had been again argued, May 10, 1869, the judgment of the court (KELLY, C. B.; BYLES, KEATING, and M. SMITH, JJ.; CHANNELL and BRAMWELL, BB.) was delivered by —

MONTAGUE SMITH, J. — In this case the plaintiff, a passenger for hire on the defendants' railway, suffered an injury in consequence of the carriage in which he travelled getting off the line and upsetting. The accident was caused by the breaking of the tire of one of the wheels of the carriage, owing to "a latent defect in the tire, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking."

Does an action lie against the company under these circumstances?

This question involves the consideration of the true nature of the contract made between a passenger and a general carrier of passengers for hire. It is obvious that for the plaintiff, on this state of facts, to succeed in this action, he must establish either that there is a warranty by way of insurance on the part of the carrier to convey the passenger safely to his journey's end, or, as the learned counsel mainly insisted, a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, — that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care, or foresight could have detected their existence.

We are of opinion, after consideration of the authorities, that there is no such contract, either of general or limited warranty and insurance, entered into by the carrier of passengers, and that the contract of such a carrier, and the obligation undertaken by him, are to take due care (including in that term the use of skill and foresight) to carry a passenger safely. It of course follows that the absence of such care — in other words, negligence — would alone be a breach of this contract; and as the facts of this case do not disclose such a breach, and on the contrary negative any want of skill, care, or foresight, we think the plaintiff has failed to sustain his action, and that the judgment of the court below in favor of the defendant ought to be affirmed.

The law of England has, from the earliest times, established a broad distinction between the liability of common carriers of goods and of passengers. Indeed, the responsibility of the carrier to redeliver the

Readhead v. Midland Railway Company.

goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed, and is so universally known, that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm, or the common law declared long ago, that carriers of goods should be so liable, it would not have been competent for the judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiffs to do in the case of carriers of passengers.

The liability of the common carrier of goods attached upon a particular bailment of the goods to him in his capacity of common carrier, and the rules which govern the rights of bailors or bailees of things, are of course applicable only to things capable of bailment. The law, and the reasons for it, in the case of bailments to carriers are found in the great judgment of *HOLT, C. J.*, in *Coggs v. Bernard*,¹ and are thus stated: "As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage for a reward to be paid to one that exercises a public employment or a delivery to a private person: *First*, If it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events; and this is the case of the common carrier, common hoyman, master of a ship, etc., which case of a master of a ship was first adjudged² in the case of *Morse v. Slue*.³ The law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." The same law is found in numerous text-books (some of which are referred to in the judgments of my brothers *MELLOR* and *LUSH* in their judgments below),⁴ and has been acted on for centuries in the case of carriers of goods.

The court is now asked to declare the same law to be applicable to contracts to carry passengers. The learned counsel for the plaintiff

¹ 1 Smith's Ld. Cas. (5th ed.) 171.

² 26 Car. 2.

³ Sir T. Raym. 220; 1 Vent. 190, 233.

⁴ L. R. 2 Q. B. 416, 421.

English Court of Exchequer Chamber.

felt the difficulty of the attempt to apply the entire liability of the carrier of goods to the carrier of passengers, but he contended for and mainly relied on the proposition that there was at least a warranty that the carriage in which the passenger travelled was roadworthy, and that the liability of the carriers of goods in this respect ought to be imported into the contract with the passenger.

But, first, it is extremely doubtful whether such warranty can be predicated to exist in the contract of a common carrier of goods. His obligation is to carry and redeliver the goods in safety, whatever happens. In the words of Lord Holt, "he is bound to answer for the goods at all events." Again, "The law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the king." And this broad obligation renders it unnecessary to import into the contract a special warranty of the roadworthiness of the vehicle; for if the goods are safely carried and redelivered, it would be immaterial whether the carriage was roadworthy or not; and if the goods are lost or damaged, the carrier is liable on his broad obligation to be answerable "at all events," and it is unnecessary to inquire how that loss or damage arose.

But, however that may be, it is difficult to see upon what principle the contract of the carrier of goods, which on the hypothesis does not apply in its entirety to carriers of passengers, is to be dissected, and a particular part of it severed and attached to what, on the hypothesis, is another and different contract. It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods applied with equal force to impose the limited warranty of the soundness of the carriage in favor of the passenger. The reason suggested was, as we understood it, that a passenger, when placed in a carriage, was as helpless as a bale of goods, and therefore entitled to have for his personal safety a warranty that the carriage was sound: but this is not the reason, or any thing like the reason, given by Lord Holt for the liability of the carrier of goods. The argument founded on this reason, however, would obviously carry the liability of the carrier far beyond the limited warranty of the roadworthiness of the carriage in which the passenger happened to travel. His safety is no doubt dependent on the soundness of the carriage in which he travels; but in the case of a passenger on a railway it is no less dependent on the roadworthiness of the other carriages in the same train and of the engine drawing them, on the soundness of the rails, of the points, of the signals, of the masonry, in fact of all the different parts of the system employed and used in his transport, and he is equally helpless

Readhead v. Midland Railway Company.

as regards them all. If, then, there is force in the above reason, why stop short at the carriage in which the passenger happens to travel? It surely has equal force as to all these things, and, if so, it must follow as a consequence of the argument that there is a warranty that all these things should be and remain absolutely sound and free from defects. This, which appears to be the necessary consequence of the argument, although Mr. *Ministry* disclaimed the desire to press it so far, tries the value of it. But surely, if the law really be as it is now contended to be, it would have been so declared long ago. No actions have been more frequent of late years than those against railway companies in respect of injuries sustained by passengers. Some of these injuries have been caused by accidents arising from defects or unsoundness in the rolling-stock, others from defects in the permanent works. Long inquiries have taken place as to the causes of these defects, and whether they were due to want of care and skill, and these inquiries would have been altogether immaterial if warranties of the kind now contended for formed part of the contract.

An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that every thing he necessarily uses is absolutely free from defects likely to cause peril, when, from the nature of things, defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man, by implication of law and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to the maxims of law, *Lex non cogit ad impossibilia*, *Nemo tenetur ad impossibilia*.

If the principle of implying a warranty is to prevail in the present case, there seems to be no good reason why it should not be equally applied to a variety of other cases,—as, for instance, to the managers of theaters and other places of public resort, who provide seats or other accommodation for the public. Why are they not to be equally held to insure by implied warranty the soundness of the structures to which they invite the public? But we apprehend it to be clear that such persons do no more than undertake to use due care that their buildings shall be in a fit state. Thus, a staircase in the Polytechnic Institution fell and injured several persons attending a public exhibition there. Two actions were brought by separate plaintiffs who had paid money for the use of this staircase. The first was tried before WIGHTMAN, J., the second before ERLE, C. J. No one seems to have supposed there was any warranty of the soundness of the staircase; yet the persons using it were as helpless to detect or prevent the accident as the travel-

English Court of Exchequer Chamber.

ler. Both learned judges put the liability entirely on the question whether there was the want of due care in maintaining the staircase, and ERLE, C. J., told the jury the defendants would not be liable for latent defects.¹ So, in stating the liability of a canal company, who made the canal for profit and allowed the public to use the canal on payment of tolls, TINDAL, C. J., in delivering the judgment of the Court of Exchequer Chamber, says: "The common law in such a case imposes a duty upon the proprietors, not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property."²

The liability in that case was not put in any degree upon a warranty that the canal should be free from perilous defects, but upon the rational obligation to use due care that it should be so.

The common law with regard to carriers of goods, and innkeepers, stands, as I have said, on its own special grounds. But it has been found so stringent, not to say unjust, in the liabilities it imposed on persons carrying on those trades, that the legislature has found it necessary in both cases to modify its stringency.

It will now be necessary to examine the leading authorities cited during the argument.

The counsel for the plaintiff, in the first place, referred to some of the cases in which it has been held that in contracts for the supply of goods for a particular purpose there is an implied warranty that the goods supplied shall be reasonably fit for that purpose. *Bigge v. Parkinson*³ is a case of that class. But the agreement to sell and supply goods for a price which may be assumed to represent their value is a contract of a different nature from a contract to carry, and has essentially different incidents attaching to it. Indeed, the learned counsel did not cite these cases as directly governing the present. Even in the cases of contracts to supply goods, it may be a question, on which it is not now necessary to express an opinion, how far and to what extent the vendor would be liable to the vendee in the case of a latent defect of the kind existing in the present case, which no skill or care could prevent or detect; that is to say, where an article is supplied which has been manufactured and tested in the best and most careful manner, so as to be turned out as perfect as in the nature of things it could be.

¹ *Brazier v. Polytechnic Institution*, 1 Fost. & Fin. 507; *Pike v. Polytechnic Institution*, 1 Fost. & Fin. 712.

² *Lancaster Canal Co. v. Parnaby*, 11 Ad. & E. 243.

³ 7 Hurl. & N. 955; 31 L. J. (Exch.) 301.

Readhead v. Midland Railway Company.

It is clear that if the manufacturer is liable for such an inevitable and undiscoverable defect, he can never sell what he makes without the risk of an action attaching itself to every contract he enters into, — without, in fact, becoming an insurer, unless he expressly limits his liability.

In cases of express warranties the compact of the parties is to be gathered from the words they use in making them. When warranties are expressly made, the parties themselves may guard against excessive liability by any exceptions they please; and in those implied by law, the law itself must take care to keep them within the boundaries of reason and justice, so as not to impose impracticable obligations.

It is now proposed to consider the authorities relied on as having a direct bearing on the question before us. The case which the plaintiff's counsel relied on as the strongest in his favor is *Sharp v. Grey*.¹ But that case, when examined, furnishes no sufficient authority for the extensive liability which the plaintiff seeks to impose on the defendants. There the plaintiff was injured by an accident caused by the breaking of the axletree of a stage-coach. The defect might have been discovered if a certain examination had taken place, and it was made a question of fact at the trial whether it would have been prudent or not to make that examination. TINDAL, C. J. (at p. 458), who tried the cause, is reported to have directed the jury to consider "whether there had been on the part of the defendant that degree of vigilance which was required by his engagement to carry the plaintiff safely." Now, if the learned CHIEF JUSTICE had supposed there was an absolute warranty of roadworthiness, this direction could not have been given, as it would have been an utterly immaterial consideration. The jury found, on this direction, for the plaintiff; and a motion was made in the absence of TINDAL, C. J., for a new trial. Two of the learned judges (GASELEE and BOSANQUET, JJ.), in refusing the rule, are certainly reported to have used expressions which seem to indicate that they thought the defendant bound to supply a roadworthy vehicle. PARK, J., uses language which, as reported, is ambiguous. But the judgment of ALDERSON, J., is distinctly opposed to the notion of a warranty against latent and undiscoverable defects. He says: "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered by investigation." We have referred somewhat fully to this case, because it was put forward as the strongest authority in support of the plaintiff's claim which can be found in the English courts, and because it was

¹ 9 Bing. 457.

English Court of Exchequer Chamber.

relied on by the judges of the Court of Appeals in New York in a decision which will be afterwards referred to. But the case, when examined, furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision, and the authority of TINDAL, C. J., and ALDERSON, J., is against the plaintiff.

The direction of BEST, C. J., in *Bremner v. Williams*¹ was not necessary to the decision of the case. The ruling of Lord ELLENBOROUGH in *Israel v. Clark*² was also relied on. Of these two last authorities BLACKBURN, J., in his judgment below,³ said: "These are, it is true, only *nisi prius* decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated or that the opinion of the judge was rightly understood." We find also that BEST, C. J., makes observations in the opposite sense in the case of *Crofts v. Waterhouse*.⁴ These are really the only English authorities which afford any support at all to the plaintiff's view, for the interpretation reported to have been given by CRESSWELL, J., in *Benett v. Peninsular and Oriental Steam Packet Company*,⁵ of the case of *Sharp v. Grey*, was only an observation made during an argument, when it was cited as incidentally bearing on the question then before the court, and cannot be relied on as an authority.

On the other hand, there is not only the plain distinction between the liabilities of carriers of goods and of passengers, constantly referred to by text-writers and judges as well known and settled law, but numerous cases have been decided on grounds entirely at variance with the supposition that there existed contemporaneously with them the liability by way of warranty. In *Aston v. Heaven*,⁶ which was the case of an injury to a passenger, EYRE, C. J., after carefully pointing out the law as to the liability of carriers of goods to make good all losses except those happening from the act of God or the king's enemies, and the reason for it, says: "I am of opinion the cases of losses of goods by carriers and the present are totally unlike." Again, "There is no such rule in the case of the carriage of persons. This action stands on the ground of negligence alone." In *Christie v. Griggs*,⁷ Sir JAMES MANSFIELD says: "There is a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was liable at all events. But he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that as

¹ 1 Car. & P. 414, 416.² 4 Esp. 259.³ L. R. 2 Q. B. 437.⁴ 3 Bing. 319.⁵ 6 C. B. 782.⁶ 2 Esp. 533. ⁷ 2 Camp. 79, *post*, p. 181.

Readhead v. Midland Railway Company.

far as human care and foresight could go, he would provide for their safe conveyance." In *Crofts v. Waterhouse*, the observations attributable to BEST, C. J., clearly show that he did not think there was any warranty on the part of the carrier of passengers; and PARK, J., in the same case, says: "A carrier of goods is liable at all events. * * * A carrier of passengers is only liable for negligence."

But besides the observations of individual judges to show what has hitherto been understood to be the law, there is the series of important cases involving costly and protracted trials, in which, by common consent, the liability of carriers of passengers has been based upon the duty to take due care, and not upon a warranty.

In *Grote v. Chester and Holyhead Railway Company*,¹ where the accident arose from the breaking down of one of the bridges of the railway, the case turned on what would or would not be negligence for which the company were answerable. PARKE, B., said:² "It seems to me the company would still be liable for the accident unless he (the engineer) also used due and reasonable care and employed proper materials in the work." There is no trace in the report that it ever occurred to the court to suppose there was any warranty of the safety of the bridge.

In a case tried before ERLE, C. J., *Ford v. London and South-Western Railway Company*,³ the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes was alleged to be the defective tire of one of the wheels of the tender. ERLE, C. J., in his direction told the jury: "The action is grounded on negligence. Negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think is reasonable to be required from the parties, considering all the circumstances. The railway company is bound to take reasonable care to use the best precautions in known practical use for securing the safety of their passengers." There the defect was in the tire of a wheel of the tender of the train by which the plaintiff travelled. And no suggestion that a warranty of its soundness existed was made throughout the case.

But a case still more directly bearing upon the present point was tried before COCKBURN, C. J.⁴ There the accident happened in consequence of the breaking of the tire of the rear wheel of the engine. The tire broke from a latent flaw in the welding. The trial lasted six days; and the questions mainly were, whether the flaw was not visible, and whether by the exercise of care it might not have been detected. The LORD CHIEF JUSTICE commences a full direction to the jury by saying:⁵ "The ques-

¹ 2 Exch. 251.² *Id.* 254.³ 2 Fost. & Fin. 730, 732.⁴ *Stokes v. Eastern Counties R. Co.*, 2 Fost. & Fin. 691.⁵ 2 Fost. & Fin. 693.

English Court of Exchequer Chamber.

tion is, whether the breaking of the tire resulted from any negligence in the defendants, or their servants, for which they are responsible." The latent defect in the tire was admitted to be the cause of the accident; but the jury having found, in answer to specific questions, that there was no evidence that the tire was negligently welded, and that the defect had not become visible, and having in other respects negatived negligence, the verdict was entered for the defendants. The facts of that case appear to be exactly like the present, except that in this case the defective tire was in the wheel of the carriage, and there in the wheel of the engine. But, for the reasons already given, it can never be that a warranty can exist as to the carriage, but not as to the engine drawing it. Thus, then, it is plain a trial of six days took place on issues which were utterly immaterial if a warranty ought to have been implied; and there the learned CHIEF JUSTICE and the parties themselves seem to have been utterly unconscious of the contract which was really existing if the plaintiff in this case is right; for the warranty, as an obligation implied by law, must have existed at the time of these trials if it exists now, and surely it is strong to show that no such rule does form part of a common law that it was not then recognized and declared.

The learned counsel for the plaintiff insisted that a carrier by sea is bound to have his ship seaworthy. Undoubtedly the carrier of goods by sea, like the carrier of goods by land, is bound to carry safely, and is responsible for all losses, however caused, whether by the unseaworthiness of the ship or otherwise; and it does not appear to be material to inquire, when he is subject to this large obligation, whether he is also subject to a less one. In the case of *Lyon v. Mells*,¹ it was no doubt stated by the court that the carrier of goods is bound to have a seaworthy ship, but this only as part of his general liability. It is well to observe that *Holroyd*, who argued for the plaintiff, and *Gaselee* for the defendant, both state the liability of the carrier in all its breadth, viz., a liability for all losses, however happening, except by the act of God and the king's enemies. This case therefore falls within the class of decisions relating to the liability of the carriers of goods. No case has been found where an absolute warranty of the seaworthiness of the ship in the case of passengers has arisen, and it affords a strong ground for presuming that no such liability exists that in this maritime nation no passenger has ever founded an action on it.

The case of *Burns v. Cork and Bandon Railway Company*,² in the Irish Court of Common Pleas, certainly does not support the plaintiff's

¹ 5 East, 423.

² Irish Rep. 13 C. L. (N. S.) 543.

Readhead v. Midland Railway Company.

view of the law. The court say there, the averments in the defendant's plea are all consistent with gross and culpable negligence, and on that ground give judgment for the plaintiff. The judgment plainly shows that the court do not mean to declare that there is an absolute undertaking that the vehicle shall be free from defects. The language is: "Free from defects so far as human care and foresight can provide, and perfectly roadworthy." The court refer with approbation to the language of Sir JAMES MANSFIELD and ALDERSON, J., which helps to explain that they were disposed to adopt the views of those learned judges, and to place the liability, not on a warranty, but on the obligation to exercise care and foresight.

It now remains to consider the American decisions on the subject. They have not been uniform. The judgment of Mr. Justice HUBBARD in *Ingalls v. Bills*,¹ cited at length by my brother MELLOR in his judgment below,² is opposed to the notion of a warranty.

Decisions, however, were cited before us by Mr. *Manisty*, from the courts of the State of New York, having a contrary tendency, to show us that in that State the law had been declared in favor of annexing a warranty to the contract. The most important of these cases is *Alden v. New York Central Railway Company*,³ in the Court of Appeals of the State of New York. That was the case of an accident caused by a defect in an axletree, and the reasons given by GOULD, J., for the decision are not satisfactory to our minds. The learned judge seems to assume that there was no negligence shown on the part of the company. He cites the case of *Sharp v. Grey*,⁴ in the Court of Common Pleas here, and he interprets that case to determine that the carrier warrants the roadworthiness of his coach. But if the view of the case of *Sharp v. Grey* taken in the early part of this judgment is correct, the learned judge gave too great weight to it. GOULD, J., then, after having given the rule as he supposed it to be laid down in *Sharp v. Grey*, observes: ⁵ "And though this may seem a hard rule, it is probably the best that can be laid down, since it is plain and easy of application, and when once established is distinct notice to all parties of their duties and liabilities." With deference to the learned judge, those reasons founded on the convenience of the arrangement are scarcely sufficient to warrant the introduction of onerous obligations into the contracts of parties; and the terms in which the judgment is given rather lead to the conclusion that the learned judge was conscious that he was annexing to the contract of the carriers of passengers what had not hitherto

¹ 9 Mete. 1, 15; *ante*, p. 123.

² L. R. 2 Q. B. 430.

³ 26 N. Y. 102.

⁴ 9 Bing. 457. ⁵ 26 N. Y. 104.

English Court of Exchequer Chamber.

been understood to form part of it. The English courts are desirous to treat the American decisions with great respect, but as their authority here must mainly depend on the reasons on which they are founded, we have felt bound to examine the reasons on which this decision was based, with the result which has been already stated.

Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given.

We have already gone fully into the reasons for holding that, in our opinion, the warranty contended for in this case is not so founded.

On the other hand, it seems to be perfectly reasonable and just to hold that the obligation well known to the law, and which because of its reasonableness and accordance with what men perceive to be fair and right has been found applicable to an infinite variety of cases in the business of life, viz., the obligation to take due care, should be attached to this contract. We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes on the carriers of passengers. Nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturer, to determine to what extent and under what circumstances they may be liable for the want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use.¹ "Due care," however, undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected.

In the result, we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and so far as it rests on principle, fails in reason. Consequently the judgment of the Court of Queen's Bench in favor of the defendants will be affirmed.

Judgment affirmed.

¹ See, on this point, *Grote v. Chester & Holyhead R. Co.*, 2 Exch. 251.

Hegeman v. Western Railroad Corporation.

3. THE SAME SUBJECT.

HEGEMAN v. WESTERN RAILROAD CORPORATION.**Court of Appeals of New York, 1855.*Hon. ADDISON GARDINER, *Chief Judge.*

" HIRAM DENIO,	} <i>Judges.</i>
" ALEXANDER S. JOHNSON,	
" CHARLES H. RUGGLES,	
" GILBERT DEAN,	} <i>Judges of the Supreme Court,</i>
" AUGUSTUS C. HAND,	
" SCHUYLER CRIPPEN,	
" RICHARD P. MARVIN,	

and ex-officio Judges of the Court of Appeals.

- Degree of Care required of Carriers of Passengers by Rail.** — The degree of precaution, care, and skill required of a carrier of passengers by stage-coaches, in the preparation and management of the means of conveyance, is not a test of that which is required of those engaged in transporting persons at a high rate of speed, by means of steam-power, upon a railway.
- Carrier responsible for the utmost Care and Skill in the Manufacture of his Vehicles.** — Whether a railroad company manufactures the cars and engines used in transporting passengers, or procures them from others, it is responsible that the utmost precaution, care, and skill have been exercised in their construction to render them sufficient and safe.
- Illustration—Case in Judgment.** — Where a passenger in a railroad car was injured by the breaking of one of the axles in consequence of a latent defect which could not be discovered by the most vigilant external examination, it was held that the company was responsible to him for damages, although it purchased the car from extensive and skilful car-makers, and the axle was procured from a manufacturer of skill and reputation, if the defect could have been discovered in the process of manufacturing the axle or car by the application of any test known to men skilled in such business.
- Question for Jury.** — It is a question for the jury to decide whether, upon the evidence, a railroad company is guilty of negligence in not ascertaining the utility of and adopting an improvement to protect passengers from injuries to which the cars are liable.

THE action was brought to recover damages for injuries to the person of the plaintiff, alleged to have been caused by the negligence of the defendant. The cause was tried at the Rensselaer County Circuit, held by William F. Allen, in October, 1852. The plaintiff proved that the defendant was the proprietor of a railroad extending from Greenbush to Boston; that in September, 1850, the plaintiff was a passenger on the railroad, having taken the train at Greenbush for Boston; and when near Hinsdale, Massachusetts, an axle of the car in which he was riding broke, and three of the passengers in the car were killed and the plaintiff

* Reported, 13 N. Y. 9.

Court of Appeals of New York.

was seriously and permanently injured. The plaintiff rested his case on proving the accident and the injury to him.

On the part of the defendant it was proved that the track of the railroad was in good order, and that the train was manned by a competent and skilful conductor, engineer, and brakemen; that at the time of the accident the train was going at the rate of from twenty-five to thirty miles an hour, being the ordinary speed of passenger-trains; and when the accident occurred the employees of the defendant were at their appropriate places, and the train was stopped as soon as possible after the axle broke. The conductor who was in charge of the train at the time, testified that the car which broke had been run upon the road about sixteen months; that it was new when it came into his train; that it was built at Springfield by the Springfield Car and Engine Company; that it was an excellent car and was used only during the summer months, as they did not wish to deface it by putting stoves in it. Another witness testified that he had been in the employ of the defendant thirteen years, and was at the time of the trial; that during the first nine years he had charge of the machinery and the running of trains, and during the last four years he was superintendent of the defendant's road; that the car in question was ordered by one Barnes, his predecessor, in January, 1848, and was delivered to the defendant the last of June in that year; that it was a part of the witness's business to examine the car, and that he did so before it was accepted by the company; that he saw the car repeatedly while it was being built, and examined it thoroughly before it was used upon the road, and that the workmanship and materials were of the best quality; that he did not know of what quality of iron the axles were made, but that the contract with the Springfield Car and Engine Company was that they should be of the best of Ames's axles, and of Salisbury iron; that at the time this car was constructed he was familiar with the cars used on the principal railroads in New England, and that the size and form of this axle were the same as those in use on other roads; that Ames's axles were among the best in New England, and that Salisbury iron was considered the best in the country; that the car had been run about sixteen months, and laid up during two winters, and that it was safe to run axles that length of time; that the company had persons in its employ at Greenbush, Springfield, and Boston whose duty it was to examine each passenger-car carefully before the starting of each train; that at the time of this accident one Stowell was thus employed at Springfield, and one Crandall at Greenbush, and that they were competent and careful men for the business in which they were employed; that the defendant's

Hegeman v. Western Railroad Corporation.

road had been in operation since 1839, and that but one axle had broken under a passenger-car prior to 1850. This witness further testified that he was present when the broken axle in question was taken from under the car, and that he then examined it; that it was broken about eleven inches inside of the wheel and about sixteen inches from the centre of the axle, and that he saw nothing indicating that there had been any external defect in the axle, and that he thought the iron was of the best quality; that one of the other axles of the broken car was bent nearly into the form of an S, and another of them was bent a little; that portions of the broken axle were tested after the accident, to try the quality and strength of the iron, by the witness, and other persons whom he named. On his cross-examination, he testified that the defendant was not in the habit of applying any tests to axles used in constructing its cars; that they were accustomed to examine for flaws, but that they did not separate the axles from the trucks for the purpose of making the examination, and they condemned them for the least flaw discovered; that there was an article called a safety-beam attached to cars, and that it was intended to hold the wheel and axle in its place in case the latter should break; that the cost of the safety-beam was \$75 per car, and that the defendant had none of them in use in 1850; that the defendant commenced using them in 1851; that he, the witness, could not say of his own knowledge that the safety-beam was in use prior to 1850, nor could he state when he first heard of them. On his further direct examination, he testified that he knew of no test to apply to car-axles; that he never saw a safety-beam in use prior to June, 1851, when they were put on some of the defendant's cars, and that he should have seen them if they had been in use on the New England roads. Stowell and Crandall, the persons named by the last witness, testified, the former, that on the morning of the day of the accident, before the car in question left Springfield for Greenbush, he examined it carefully, particularly its axles and wheels, to see if it was safe and in good condition, and that he discovered no defect or indication of weakness or unsoundness; and the latter, that he made a similar examination of the car at Greenbush, just before it left there on the day of the accident, with the like result. A number of other witnesses were examined on the part of the defendant, who had skill and knowledge as to iron and its manufacture, and in making and operating railroad cars, who testified in substance that the car in question was built by the Springfield Car and Engine Company; that the axle which broke was of the usual size and description of axles then in use; and that it was made of good Salisbury iron, which was and is

Court of Appeals of New York.

considered the best kind of iron for such purposes. They also testified that after the accident the broken axle was examined by them, with a view of ascertaining the quality of the iron, and subjected to the usual tests for determining the strength of iron, and that it proved to be of superior quality and strength. They further testified that upon examining the axle after it was broken, a slight crack was discovered in the iron, at the broken point, about a quarter of an inch deep and one and one-half inches long; that this kind of crack is peculiar to hammered iron, and is called a "fire-crack," and that there was no way of discovering its existence except by bending the axle after it was manufactured; that this defect in the axle could not be discovered before it was broken, by careful inspection, or by striking it with a hammer, or in any way except by bending it; that no external defect existed in the axle, which was discoverable.

The plaintiff, in reply, called several witnesses, who, after objection and exception by the defendant, testified that the safety-beam was invented many years prior to 1850; that during several years previous to 1850 it was in use on some of the railroads in the State of New York, in New Jersey, and other sections of the country; but that it was not in use on the New England roads prior to 1851, and that it was not generally adopted and put in use on railroads until 1851. The plaintiff also gave evidence in reply, tending to show that some persons engaged in manufacturing car-axles and cars were accustomed to bend the iron of which the axles were made, and the axles after they were manufactured and before they were used in constructing the car, to discover fire-cracks. There was no evidence that the iron of which the axle in question was made, or the axle itself, was subjected to this test.

At the close of the evidence, the counsel for the defendant requested the court to charge the jury that if the defendant exercised all the care and diligence which it could reasonably exercise in providing a safe track and a safe engine and cars, and properly supplied its train with a suitable number of competent and faithful men to take charge of the train, and those men managed the train in a careful and skilful manner, the defendant is not liable. The court did so charge.

The counsel for the defendant also asked the court to charge that the defendant was only bound to have its cars constructed in the manner then commonly in use, and then deemed sufficient and safe; the fact that it had not adopted the safety-beam, or any other invention, new or old, which was not then in use or deemed necessary by careful persons

Hegeman v. Western Railroad Corporation.

in the same pursuits in the defendant's locality, is not evidence of negligence. The court declined so to charge; but, in response to this request, did charge, in substance, that the omission to adopt the safety-beam was not, *per se*, necessarily evidence of negligence, but that the question of negligence was for the jury, and did not depend upon what others deemed necessary, but what the jury should believe the defendant had reason to suppose, and ought, under the circumstances proved, to have known, was necessary to the safety of passengers; that the usual mode of constructing cars in the defendant's locality was proper to be considered by the jury with the other circumstances, but was not necessarily controlling. To this refusal of the court to charge as requested, and to the charge as given, the counsel for the defendant excepted.

The counsel for the defendant also asked the court to charge that, in respect to the breaking which is complained of, the defendant cannot be held guilty of negligence if it purchased the axle from manufacturers having a high character for the excellence and safety of the axles manufactured and sold by them, and the defendant used such care and skill in searching for defects as is characteristic of cautious persons engaged in the same pursuit, even though defects did exist such as caused the breaking by which the plaintiff was injured, provided such defects could not be discovered on such examination. The court declined so to charge, but instructed the jury that the defendant was responsible for any defects which were known to the manufacturer, or which might have been discovered by him upon a vigilant and careful examination of the axle, or which, after delivery, might have been discovered upon a like examination by a competent person; that the reputation of the manufacturer should be taken into consideration with the other circumstances, but would not alone absolve the defendant from responsibility. To this refusal to charge as requested, and to the charge as given, the defendant's counsel excepted.

The counsel for the defendant requested the court to instruct the jury that the defendant, under the circumstances of this case, was not liable for any defect which existed in the axle, if such defect was not discoverable after the purchase of the car and axle, upon such examinations as are characteristic of cautious persons engaged in the same pursuit as the defendant. The court declined to do so, but charged the jury that, as to the materials of which the axle was made, if they were not of a proper quality, or wrought in a proper manner, and the defects were of that character that they could have been discovered upon a

Court of Appeals of New York.

vigilant examination by a person of competent skill, either at the time of the construction or afterwards, then the defendant was responsible for the consequences ; and the counsel for the defendant excepted.

The defendant's counsel also asked the court to charge the jury that in making the careful examinations required by law, before the train started, the defendant was not guilty of negligence if it made all the examinations which human skill and foresight could make without taking the machinery to pieces ; and the court did so charge.

The court also, among other things, charged the jury that the defendant, under the circumstances of this case, was responsible for all defects in the axle by the breaking of which the injury to the plaintiff occurred, and which might have been discerned and remedied, to the same extent as if it had manufactured said axle in its own workshop and by its immediate agents.

The court also charged the jury that although the defendant purchased its axles and cars of extensive and skilful manufacturers, who, in the exercise of their skill in the manufacture, knew of no test and used no test to discover latent defects in axles, yet if there was any test known to others, and which should have been known and employed by the manufacturers as men professing skill in their particular business, although the same may not have been used by some others engaged in the same business of manufacturing cars and axles, defendant was guilty of negligence in not using this test, provided the injury occurred to the plaintiff by reason of a defect which, by such test, might have been discerned.

The court also charged the jury that if they should be of the opinion that a safety-beam was designed and calculated to prevent an injury to passengers in case of the breaking of an axle, it did not necessarily follow that the defendant was liable because it had not adopted it, but it would be for the jury to say whether the defendant was or was not negligent in informing itself of the necessity and utility of the invention and availing itself of it, taking into consideration the vigilance required of carriers of passengers for hire, and of the publicity of the invention, and of its use prior to and at the time of the injury ; that it was no apology that the safety-beam was not in use by the New England railroads or by any other particular roads. The counsel for the defendant duly excepted to each portion of the foregoing charge, which was not in accordance with the requests made to the court, above stated.

The jury rendered a verdict in favor of the plaintiff, and assessed his damages at \$9,900. Judgment was rendered upon the verdict. The

Hegeman v. Western Railroad Corporation.

defendant thereupon moved, in the Supreme Court, sitting in the Third District, for a new trial.

David L. Seymour, for the plaintiff, *M. I. Townsend*, for the defendants.

The opinion of the court¹ (consisting of *WATSON*, *WRIGHT*, and *HARRIS*, JJ.) was delivered by —

HARRIS, J. — The defendants were carriers of passengers, and as such were bound to conduct their business with all the care which human prudence and skill could suggest. Any thing short of this would make them liable for the consequences. Having the exclusive management and control of their cars and road, it was presumable that no accident would occur without some neglect, or want of skill or foresight. An accident having occurred, and the plaintiff having been injured by means of such accident, a *prima facie* case of negligence was made out, which, unless it should be overcome by proof on the part of the defendants showing that they had been wholly faultless, would entitle the plaintiff to recover compensation for the injury he had sustained.²

This burden of proof was assumed by the defendants. They gave evidence to show that they had purchased the car from a manufacturer of high reputation for the excellence and safety of the cars manufactured by him; and that, after employing all reasonable care and skill for the purpose of detecting any defect in the machinery, the defect in the axle, which was the cause of the accident, had remained undiscovered, and in fact could not be discovered by means of any examination which the defendants were able to make.

The rule of law applicable to the evidence, upon this branch of the case, was very accurately stated by the learned judge at the circuit. After having distinctly laid down the general proposition that the defendants were not liable if they had exercised all reasonable care and diligence in providing a safe track and a safe engine and cars, and had properly supplied their train with a suitable number of competent and faithful men to take charge of the train, and those men had managed it in a careful and skilful manner, he proceeded to say, in respect to the defect in the axle, that the defendants were responsible for this defect to the same extent as if the axle had been manufactured by themselves. Of the soundness of this rule I think there can be no doubt. From the very necessity of the case, the defendants are obliged to carry on their business through the instrumentality of agents. Some are employed to

¹ 16 Barb. 353.

² *Holbrook v. Utica etc. R. Co.*, 16 Barb. 113, and cases there cited.

Court of Appeals of New York.

construct or keep in repair their roadway; others to construct or repair their engines and cars; and others, again, to operate such engines and cars upon the road. For neglect or want of skill in any of these, the defendants, as principals, are answerable to third persons. Whether the engine or car which they place upon the road for the purpose of carrying passengers has been manufactured in their own workshops by agents employed directly for that purpose, or by a manufacturer engaged in the business of supplying such articles for sale, they are alike bound to see that in the construction no care or skill has been omitted, for the purpose of making such engine or car as safe as care and skill can make it. When such care and skill have been exercised, the defendants' duty in this respect has been discharged. If, on the other hand, a defect exist in the construction, which might have been detected and remedied, they are answerable for the consequences.¹ In the latter case, an injury had happened to a passenger in a stage-coach, by reason of an original defect in the construction of an axletree. ALDERSON, J., said: "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation; if not, he might buy ill-constructed or unsafe vehicles and his passengers be without remedy." PARK, J., said: "This was entirely a question of fact. It is clear that there was a defect in the axletree, and it was for the jury to say whether the accident was occasioned by what, in law, is called negligence in the defendant, or not."

The cases bearing upon this question, both English and American, have been examined with great clearness and ability in *Ingalls v. Bills*.² The doctrine stated by Mr. Justice HUBBARD, who pronounced the judgment of the court in that case, as the result of his examination, is that, "if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence. On the other hand, if the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable." The question of liability is here put upon its true foundation. It is a question of negligence, not of warranty; a question for the jury, not for the court. It being ascertained that the accident which resulted in the injury for which the action is brought was caused by a defect in the

¹ Citing *Ang. on Car.*, § 435; *Sharp v. Grey*, 9 Bing. 457.

² 9 Metc. 1, *ante*, p. 112.

Hegeman v. Western Railroad Corporation.

construction of the vehicle, it must then be referred to the jury to say, upon the evidence, whether "the defect might have been discovered upon a careful and thorough examination," or whether it was so hidden that "the most careful and thorough examination would not have disclosed it." The charge of the learned judge who tried this case was in conformity with this rule. The jury were instructed that, in respect to the defect in the axle, the defendants' liability would depend upon the question whether the defect was of such a character that it "could have been discovered upon a vigilant examination by a person of competent skill, either at the time of construction or afterwards." The true test of the defendants' liability, upon this branch of the case, was thus presented.

But the plaintiff, without regard to the question arising upon the defect in the axle, had insisted that the defendants were liable by reason of their omission to provide the car with a *safety-beam*. Evidence had been given to show that this improvement had been extensively known and used prior to the time when the accident happened, and also to show its utility as a safeguard against accidents. The evidence, though objected to, was properly received. The defendants were bound to use every precaution which human skill and foresight could suggest to insure the safety of their passengers. If, then, it could be shown that the safety-beam was an article of such established utility and so extensively known that it ought to have been used by the defendants upon their cars, they might justly be charged with negligence in not adopting it. The judge was right, therefore, not only in receiving the evidence, but in submitting it to the jury to say whether, "taking into consideration the vigilance required of carriers of passengers, and the publicity of the invention, and of its use prior to the time of the injury, the defendants were or were not negligent in not informing themselves of the utility and necessity of the invention and availing themselves of it."

Nor do I think the court is called upon to interfere on the ground of excessive damages. It is true the damages awarded by the jury seem quite ample, being nearly twice the amount which could have been recovered if the plaintiff had been actually killed. It must also be conceded that, though the jury have found the defendants chargeable with negligence, it was not a case of very gross negligence. Indeed, the evidence shows no want of ordinary care on the part of the defendants. It is only because the defendants were bound to conduct their business with the greatest possible care and caution that they were made liable at all. But, on the other hand, the case shows that the injury sustained by the plaintiff is entirely beyond any pecuniary esti-

Court of Appeals of New York.

mate. An artisan engaged in business, he was confined to his bed for several months, and, from the nature of his injuries, must have been the subject of extreme pain and suffering. Up to the time of the trial he had scarcely been able to leave his house, and so permanent are his injuries that it is not probable he will ever again possess the ability to provide for the support of himself or his family. Under such circumstances, it cannot be said that the damages awarded by the jury are so excessive as to call for the interference of the court. The motion for a new trial should therefore be denied.

New trial denied.

From this decision the defendants appealed to the Court of Appeals, where the cause was again argued by —

John H. Reynolds, for the appellant, and *David L. Seymour*, for the respondent.

The opinion of the court was delivered by —

GARDINER, C. J. — It has been said that every wayfarer must take the risks incident to the mode of travel he adopts; but these risks are only those which cannot be avoided by the carrier of passengers by the utmost degree of care and skill in the preparation and management of the means of conveyance.¹ The carrier, in the language of other judges, is bound to use all precautions, as far as human care and foresight will go, for the safety of his passengers.² In the application of these principles, it is obvious that the same precautions will not exonerate the carrier of passengers from responsibility in every mode of travel. The foresight and preparation that would suffice to satisfy the rule in one species of navigation or conveyance, would not answer in another; and the external examination which, in connection with the reputation of the builder of a stage-coach, would and ought to satisfy the scruples of the most cautious person as to the safety and security of a vehicle designed to run from six to eight miles the hour, would not satisfy any reasonable man as to the sufficiency of another, intended to sustain a far greater weight, and to be propelled by steam thirty, forty, or fifty miles in the same time. The charge of the learned judge at the trial assumes and proceeds upon this distinction throughout; and in that part of it where he gives the measure of the responsibility of the defendant, in the strongest terms against him and in favor of the plaintiff, he says, “that although the defendant purchased his axles and cars of extensive and skilful manufacturers, who, in the

¹ Ang. on Car., § 523.

² 2 Kent's Comm. (7th ed.) 602, and cases cited.

Hegeman v. Western Railroad Corporation.

exercise of their skill, knew of no test and used no test to discover latent defects in axles, yet if there were any tests known to others, and which should have been known and employed by the manufacturers as men professing skill in their particular business, although the same may not have been used by some others engaged in the same business, defendant was guilty of negligence in not using this test, provided the injury occurred to the plaintiff by reason of a defect which, by such test, might have been discovered." The substance of the charge was, that although the defect was latent, and could not be discovered by the most vigilant external examination, yet if it could be ascertained by a known test, applied either by the manufacturer or the defendant, the latter was responsible.

In these instructions there was no error. *Ingalls v. Bills*,¹ cited by the defendant's counsel, was the case of a stage-coach, in which the injury was occasioned by the breaking of the axle. The fracture was internal, and surrounded by sound iron one-quarter of an inch thick. The court held that where the accident arises from a hidden and internal defect, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor was not liable for the injury. I concur in that decision, in the particular case presented; but the learned judge did not intimate "that a sound judgment and the most vigilant oversight" would be evidenced by the adoption of the same methods of examination in the case of a stage-coach and a car for the express-train of a railroad. The mode of construction, the purposes to be subserved, and, above all, the probable consequences of a hidden defect, in the two cases are altogether different. It might as plausibly be urged that a chain for agricultural purposes and the cable of a ship of the line should be subjected to the same tests, because both were chains and each manufactured of the same material. Keeping the distinction indicated in view, the charge was sufficiently favorable to the defendant.

Two questions were presented for the consideration of the jury: *first*, Was there a test known to and used by others, and which should have been known to a skilful manufacturer, by which the concealed defect in the axle of the car could have been detected? and if so, then, *secondly*, Was the injury to the plaintiff the consequence of that imperfection? There was evidence tending to establish these facts, which the jury have found; and the question returns, Can the defendant, who

¹ 9 Metc. 1, ante, p. 112.

Court of Appeals of New York.

neither applied the test, nor caused it to be applied by the manufacturer, insist that this accident "could not have been avoided by the utmost degree of care and skill in the preparation of the means of conveyance," or "that they used all precautions, as far as human care and foresight would go, for the safety of the plaintiff as one of their passengers"? It seems to me that there can be but one answer to the question.

It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron or manufacturers of cars, in the prosecution of their business. This also must be conceded. What the law does require is that they shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the "utmost care and skill in its preparation." They may construct it themselves, or avail themselves of the services of others; but in either case they engage that all that well-directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public, or the law, as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skilfully exercised in the particular instance. If to this extent they are not responsible, there is no security for individuals or the public.

It is perfectly understood that latent defects may exist undiscoverable by the most vigilant examination, when the fabric is completed, from which the most serious accidents have and may occur. It is also well known, as the evidence in this suit tended to prove and the jury have found, that a simple test—that of bending the iron after the axle was formed, and before it was connected with the wheel—existed by which it could be detected. This should have been known and applied by men "professing skill in that particular business." It was not known, or, if known, was not applied by these manufacturers. It was not used by the defendant, nor did they inquire whether it had been used by the builders. They relied upon an external examination, which they were bound to know would not, however faithfully prosecuted, guard their passengers against the danger arising from concealed defects in the iron of the axles, or in the manufacture of them. For this omission of duty, or want of skill, the learned judge held, and I think correctly, that they were liable.

This is the only important question in the cause. The requests of the defendant's counsel to the judge for instructions to the jury, were

Hegeman v. Western Railroad Corporation.

intended to present this principal point in its strongest aspect for the defendant; and all the exceptions are determined, if the above suggestions are well founded.

The evidence of the utility and use of the safety-beam was properly admitted. It had been used in New Jersey eleven years before this accident, and upon some of the Albany and Buffalo roads from the latter part of the year 1846, and in 1851 was introduced upon the road of the defendant. Whether the adoption of this improvement, under all the circumstances, was a necessary or proper precaution on the part of the defendant, was correctly submitted to the jury.

The judgment of the Supreme Court should be affirmed.

JOHNSON, HAND, CRIPPEN, and DEAN, JJ., concurred in the foregoing opinion.

MARVIN, J. (dissenting). — In his charge, the learned justice first told the jury that if the defendant exercised all the care and diligence which he [they] could reasonably exercise in providing a safe track and a safe engine and cars, and properly supplied their train with a suitable number of competent and faithful men to take charge of it, and those men managed the train in a careful and skilful manner, the defendant was not liable. This instruction was given in the form desired by the defendant. In a subsequent part of the charge, the judge instructed the jury that the defendant was responsible for any defects which were known to the manufacturer, or which might have been discovered by him upon a vigilant and careful examination of the axle, or which, after delivery, might have been discovered upon a like examination by a competent person; that the reputation of the manufacturer should be taken into consideration with the other circumstances, but would not alone absolve the defendant from responsibilities. The defendant excepted to this part of the charge.

The car, the axle of which was broken, was manufactured by the Springfield Car and Engine Company for the defendant. This company manufactured cars for many railroad companies. It procured the axle that broke in the present case from Ames's factory, an extensive manufactory of iron. I do not understand that the Springfield Car and Engine Company, or Ames or his factory, were in any sense the servants or agents of the defendant. The latter worked in iron, and made axles and sold them to the manufacturers of cars or to railroad companies; and the former manufactured to order, cars, etc., for railroads. As I understand the charge, the defendant was to be held responsible for any defects in the axle which were known to the manufacturer, or which might have been discovered by him upon a vigilant and careful

Court of Appeals of New York.

examination; it is added, "or which, after delivery, might have been discovered upon a like examination by a competent person." The judge further charged that, as to the materials of which the axle was made, if they were not of a proper quality, or wrought in a proper manner, and the defects were of that character that they could have been discovered upon a vigilant examination by a person of competent skill, either at the time of the construction or afterwards, then the defendant was responsible for the consequences. He also charged that the defendant was responsible for all defects in the axle, which might have been discovered and remedied, to the same extent as if the defendant had manufactured said axle in its own workshop and by its immediate agents. The charge takes the position that the defendant was responsible for any defect in the axle, whether of materials, workmanship, or otherwise, which were known, or might have been discovered by the manufacturer upon a vigilant and careful examination at the time of construction or afterwards. In other words, the defendant was made surety for the skill and extraordinary care and vigilance of the manufacturers; and if, in fact, a defect existed or happened at the time of construction, which could have been detected by the manufacturer, though such defect was secret at the time the defendant purchased and used the axle, and not discoverable, still the defendant would be liable for the want of care on the part of the manufacturer. In my opinion, this position cannot be sustained unless we are prepared to hold that railroad companies shall be held liable for all defects, whether discoverable or not; thus making them warrantors of the roadworthiness of their cars, etc. The manufacturers of the axle and the car were not the servants or agents of the defendant; they pursued an independent business, and for any want of care or skill, or for negligence, they were liable. It would, in my opinion, be very dangerous to establish the rule that he who purchases and uses an article manufactured by a mechanic shall be responsible for any injury to third persons in consequence of a defect in the article, not discoverable by the purchaser and user. Such a principle would be far-reaching, and it is not possible now to consider and fix a limit to the cases to which it would apply. It goes entirely beyond the rule making every one responsible for his own negligence and the negligence of his servants and agents.

In *Stevens v. Armstrong*,¹ it was held by this court that to render one person liable for the negligence of another, the relation of master and servant or principal and agent must exist between them. In the pres-

¹ 6 N. Y. 435.

Hegeman v. Western Railroad Corporation.

ent case, it is argued that the charge of the judge is not in conflict with the case just cited; that it does not make the defendant liable for the negligence of the manufacturer, but for its own neglect in not doing, or causing to be done, what human care and foresight could have done to discover and remedy the defect in the construction of the car in question. Does not this proposition involve the responsibility of the defendant for any want of care or for any neglect in the manufacturer, though such want of care or neglect could not be detected after the car was completed and when it was put in use? As I understand the judge, he made the defendant liable for any defect happening during the construction of the car and axle which could have been detected by the manufacturer, though it could not be detected by the defendant after the car and axle were completed. I agree that the defendant should be held to the exercise of the utmost care and diligence. I think in *Ingalls v. Bills*¹ the proper distinction was made and the true principles were established. In that case, decided in 1845, all the English cases were reviewed and the American cases referred to, and I shall content myself with this reference to that case, adopting the reasoning of the court there and applying it to the present case. I think the learned judge erred in the rule of responsibility, and that there should be a new trial.

DENIO, J. (dissenting). — I understand the effect of the charge to be that the defendant is responsible in the same manner which he would be if, besides managing the railroad, he was also the manufacturer of his cars, and of all the parts of which they are composed, including the axles. The workmen of the iron manufacturers are to be regarded, according to the charge, as the servants of the railroad company, and it is responsible for the negligence of such workmen as for that of its immediate agents and servants. This, I think, cannot be sustained. If the defendant had chosen to commit to others the doing of things which its charter contemplated should be performed by the company, it might be estopped from alleging that such other persons were not its servants; but the manufacture of the passenger-cars is a separate and distinct business, and the workmen employed in constructing them and the iron-work composing their several parts are not, in my opinion, in any proper sense the servants of the railroad corporation. The cases upon the point have been mentioned by Judge MARVIN, and it is only necessary to add to them those which are referred to in Smith's *Treatise on the Law of Master and Servant*, at p. 164 *et seq.*

I am in favor of reversing the judgment of the Supreme Court.

Judgment affirmed.

Supreme Court of the United States.

4. THE SAME SUBJECT, IN ITS APPLICATION TO FREE PASSENGERS.

STEAMBOAT NEW WORLD *v.* KING.**Supreme Court of the United States, 1853.*Hon. ROGER B. TANEY, *Chief Justice.*

" JOHN McLEAN,	} <i>Associate Justices.</i>
" JAMES M. WAYNE,	
" JOHN CATRON,	
" PETER V. DANIEL,	
" SAMUEL NELSON,	
" ROBERT C. GRIER,	
" BENJAMIN R. CURTIS,	
" JOHN A. CAMPBELL,	

1. **Negligent Injury to Free Passenger.**—Where it was shown to be customary for masters of steamboats to permit persons who were usually employed upon steamboats to ride from one place to another free, it was held that a person who had been an employee on the particular boat, and who had been permitted by the master to ride upon it without paying fare, was lawfully thereon, and that for an injury done him by the negligence of the crew in the management of the steamboat, he was entitled to recover damages.
2. **Obligation of Carriers of Passengers by Steam.**—The following language of the court in *Philadelphia and Reading Railroad Company v. Derby*¹ is reaffirmed: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they shall be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross."
3. **Degrees of Negligence.**—Per Curtis, J.: The theory that there are three grades of negligence cannot be usefully applied in practice.
4. **Negligence in Employments which require Skill.**—Whenever a person undertakes an employment which requires skill, whether for a reward or gratuitously, a failure to exert the measure of skill appropriate to such employment is culpable negligence, and for damages resulting from such failure an action lies.
5. **Burden of Proof under Act of Congress relating to Vessels propelled by Steam.**—Under § 13 of the act of July 7, 1838 (5 Stats. at Large, 306), if a person is injured on board a steamboat by the injurious escape of steam, it is incumbent upon the owners, in an action against them, to prove that there was no negligence.

THE case is stated in the opinion.

Cutting, for the appellants; *Mayer*, *contra*.

Mr. Justice CURTIS delivered the opinion of the court. — This is an appeal from a decree of the District Court of the United States for the

* Reported, 16 How. 469.

¹ *Ante*, p. 31.

Steamboat *New World v. King*.

Northern District of California, sitting in admiralty. The libel alleges that the appellee was a passenger on board the steamer on a voyage from Sacramento to San Francisco, in June, 1851, and that, while navigating within the ebb and flow of the tide, a boiler-flue was exploded through negligence, and the appellee grievously scalded by the steam and hot water.

The answer admits that an explosion occurred at the time and place alleged in the libel, and that the appellee was on board and was injured thereby, but denies that he was a passenger for hire, or that the explosion was the consequence of negligence.

The evidence shows that it is customary for the masters of steamboats to permit persons whose usual employment is on board of such boats to go from place to place free of charge; that the appellee had formerly been employed as a waiter on board this boat, and just before she sailed from Sacramento he applied to the master for a free passage to San Francisco, which was granted to him, and he came on board. It has been urged that the master had no power to impose any obligation on the steamboat by receiving a passenger without compensation. But it cannot be necessary that the compensation should be in money, or that it should accrue directly to the owners of the boat. If the master acted under an authority usually exercised by masters of steamboats, if such exercise of authority must be presumed to be known to and acquiesced in by the owners, and the practice is even indirectly beneficial to them, it must be considered to have been a lawful exercise of an authority incident to his command.

It is proved that the custom thus to receive steamboatmen is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it. And the fair presumption is that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment tends to render that employment more desirable, and, of course, to enable the employer more easily and cheaply to obtain men to supply his wants.

It is true the master of a steamboat, like other agents, has not an unlimited authority. He is the agent of the owner to do only what is usually done in the particular employment in which he is engaged. Such is the general result of the authorities.¹ But different employments may and do have different usages, and consequently confer on the master different powers. And when, as in this case, a usage

¹ Smith on Merc. Law, 559; *Grant v. Norway*, 10 C. B. 683; s. c. 2 Eng. Law & Eq. 337; *Pope v. Nickerson*, 3 Story, 475; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 32.

Supreme Court of the United States.

appears to be general, not unreasonable in itself, and indirectly beneficial to the owner, we are of opinion the master has power to act under it and bind the owner.

The appellee must be deemed to have been lawfully on board under this general custom.

Whether precisely the same obligations in all respects on the part of the master and owners and their boat existed in his case as in that of an ordinary passenger paying fare, we do not find it necessary to determine. In *Philadelphia and Reading Railroad Company v. Derby*,¹ which was a case of gratuitous carriage of a passenger on a railroad, this court said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross."

We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law.

The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. In *Storer v. Gowen*,² the Supreme Court of Maine say: "How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances, which the law cannot exactly define." Mr. Justice Story says:³ "Indeed, what is common or ordinary diligence is more a matter of fact than of law." If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine in each case what the duty

¹ 14 How. 486, *ante*, p. 31.

² 18 Me. 177.

³ Story on Bail., § 11.

 Steamboat *New World* v. King.

was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned.

Recently the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them.¹ It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as *Tracy v. Wood*² and *Foster v. The Essex Bank*,³ would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law, and on the Civil Code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties.⁴

But whether this term, gross negligence, be used or not, this particular case is one of gross negligence, according to the tests which have been applied to such a case.

In the first place, it is settled that "the bailee must proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part."⁵

It is also settled that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed or from inattention, is gross negligence. Thus, HEATH, J., in *Shiells v. Blackburne*,⁶ says: "If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery." And Lord LOUGHBOROUGH declares that an omission to use skill is gross negligence. Mr. Justice STORY, although he controverts the doctrine of Pothier, that any negligence renders a gratuitous bailee responsible for the loss occasioned by his fault, and also the distinction made by Sir WILLIAM JONES between an undertaking to carry and an undertaking to do work, yet admits that the responsibility exists when there is a want of due skill, or an omission to exercise it. And the same may be said

¹ *Wilson v. Brett*, 11 Mee. & W. 113; *Wylde v. Pickford*, 8 Mee. & W. 443, 461, 462; *Hinton v. Dibbin*, 2 Q. B. 646, 651.

² 3 Mason, 132.

³ 17 Mass. 479.

⁴ See *Toullier's Droit Civil*, 6th vol., p. 239, etc.; *id.*, 11th vol., p. 203, etc.; *Mackeldey, Man. Du Droit Romain*, 191, etc.

⁵ *Story on Bail*, § 15.

⁶ 1 H. Black. 161.

 Supreme Court of the United States.

of Mr. Justice PORTER, in *Percy v. Millaudon*.¹ This qualification of the rule is also recognized in *Stanton v. Bell*.²

That the proper management of the boilers and machinery of a steamboat requires skill, must be admitted. Indeed, by the act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully, endangers to a frightful extent the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam-boilers but too painfully proves. We do not hesitate, therefore, to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of the gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress has in clear terms excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property.

The thirteenth section of the act of July 7, 1838,³ provides: "That in all suits and actions against proprietors of steamboats for injury arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other dangerous escape of steam, the fact of such bursting, collapse, or injurious escape of steam shall be taken as full *primâ facie* evidence sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him, or those in his employment."

This case falls within this section; and it is therefore incumbent on the claimants to prove that no negligence has been committed by those in their employment.

Have they proved this? It appears that the disaster happened a short distance above Benicia; that another steamer, called the Wilson G. Hunt, was then about a quarter of a mile astern of the New World, and that the boat first arriving at Benicia got from twenty-five to fifty passengers. The pilot of the Hunt says he hardly knows whether the boats were racing, but both were doing their best; and this is confirmed by the assistant pilot, who says the boats were always supposed to come

¹ 8 Martin, 75.² 2 Hawks, 145.³ 5 Stats. at Large, 306.

Steamboat New World v. King.

down as fast as possible ; the first boat at Benicia gets from twenty-five to fifty passengers. And he adds that at a particular place, called "the slough," the Hunt attempted to pass the New World. Fay, a passenger on board the New World, swears that on two occasions before reaching "the slough" the Hunt attempted to pass the New World, and failed ; that to his knowledge these boats had been in the habit of contending for the mastery, and on this occasion both were doing their best. The fact that the Hunt attempted to pass the New World in "the slough" is denied by two of the respondents' witnesses, but they do not meet the testimony of Fay as to the two previous attempts. Haskell, another passenger, says : "About ten minutes before the explosion I was standing looking at the engine ; we saw the engineer was evidently excited, by his running to a little window to look out at the boat behind. He repeated this ten or fifteen times in a very short time." The master, clerk, engineer, assistant engineer, pilot, one fireman, and the steward of the New World were examined on behalf of the claimants. No one of them, save the pilot, denies the fact that the boats were racing. With the exception of the pilot and the engineer, they are wholly silent on the subject. The pilot says they were not racing. The engineer says : "We have had some little strife between us and the Hunt as to who should get to Benicia first. There was an agreement made that we should go first. I think it was a trip or two before." Considering that the master says nothing of any such agreement ; that it does not appear to have been known to any other person on board either boat ; that this witness and the pilot were both directly connected with and responsible for the negligence charged ; and that the fact of racing is substantially sworn to by two passengers on board the New World, and by the pilot and assistant pilot of the Hunt, and is not denied by the master of the New World, we cannot avoid the conclusion that the fact is proved. And certainly it greatly increases the burden which the act of Congress has thrown on the claimants. It is possible that those managing a steamboat engaged in a race may use all that care and adopt all those precautions which the dangerous power they employ renders necessary to safety ; but it is highly improbable. The excitement engendered by strife for victory is not a fit temper of mind for men on whose judgment, vigilance, coolness, and skill the lives of passengers depend. And when a disastrous explosion has occurred in such a strife, this court cannot treat the evidence of those engaged in it, and *primâ facie* responsible for its consequences, as sufficient to disprove their own negligence, which the law presumes.

English Court of King's Bench.

We consider the testimony of the assistant engineer and fireman, who are the only witnesses who speak to the quantity of steam carried, as wholly unsatisfactory. They say the boiler was allowed by the inspector to carry forty pounds to the inch, and that when the explosion occurred they were carrying but twenty-three pounds. The principal engineer says he does not remember how much steam they had on. The master is silent on the subject, and says nothing as to the speed of the boat. The clear weight of the evidence is that the boat was, to use the language of some of the witnesses, doing its best. We are not convinced that she was carrying only twenty-three pounds,—little more than half her allowance.

This is the only evidence by which the claimants have endeavored to encounter the presumption of negligence. In our opinion, it does not disprove it; and consequently the claimants are liable to damages, and the decree of the District Court must be affirmed.

Decree affirmed.

5. PRESUMPTION OF NEGLIGENCE FROM THE HAPPENING OF THE ACCIDENT.

CHRISTIE *v.* GRIGGS.*

English Court of King's Bench, 1809.

Before Lord MANSFIELD, *Chief Justice*, at Nisi Prius.

- 1 **Breaking of Vehicle prima facie Evidence of Negligence.**—In an action against the proprietor of a stage-coach for negligence whereby the coach broke down, and the plaintiff, travelling by it as a passenger, was hurt, to prove negligence it is *prima facie* enough to give evidence of the coach having broke down, from which negligence will be inferred.
- 2 **Carrier not answerable for Mere Accident.**—The proprietor of a stage-coach is not answerable for any damage that may happen to a passenger from the coach being overturned by mere accident.

THIS was an action of *assumpsit* against the defendant as owner of the *Blackwall stage*, on which the plaintiff (a pilot) was travelling to London, when it broke down, and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second, to the insufficiency of the carriage.

The plaintiff having proved that the axletree snapped asunder at a

* Reported, 2 Camp. 79.

Christie v. Griggs.

place where there is a slight descent from the kennel crossing the road, that he was in consequence precipitated from the top of the coach, and that the bruises he received confined him several weeks to his bed, there rested his case.

Vaughan, Serjt., and *Roberts*, for the plaintiff; *Best*, Serjt., for the defendant.

Best, Serjt., contended strenuously that the plaintiff was bound to proceed farther, and give evidence either of the driver being unskilful or of the coach being insufficient.

Sir JAMES MANSFIELD, C. J. — I think the plaintiff has made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself, and how do they know whether the coach was well built, or whether the coachman drove skilfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded; and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a *mere accident*.

The defendant then called several witnesses, who swore that the axletree had been examined a few days before it broke, without any flaw being discovered in it; and that when the accident happened, the coachman, a very skilful driver, was driving in the usual track and at a moderate pace.

Sir JAMES MANSFIELD said, as the driver had been cleared of every thing like negligence, the question for the jury would be as to the sufficiency of the coach. If the axletree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking as to them went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered.

The jury found a verdict for the defendant.

 Supreme Court of the United States.

6. THE SAME SUBJECT—CONTRIBUTORY NEGLIGENCE OF THE PASSENGER.

STOKES v. SALTONSTALL.*

*Supreme Court of the United States, 1839.*Hon. ROGER B. TANEY, *Chief Justice.*

" JOSEPH STORY,	} <i>Associate Justices.</i>
" SMITH THOMPSON,	
" JOHN McLEAN,	
" HENRY BALDWIN,	
" JAMES M. WAYNE,	
" PHILIP P. BARBOUR,	
" JOHN CATRON,	
" JOHN MCKINLEY,	

1. **Extent of Liability.**—A carrier of passengers for hire is not an insurer for their safety; but in case they are injured while in transit, he is or is not liable to pay damages for such injury, accordingly as he or his servants or agents have or have not been guilty of negligence.
2. **Presumption from happening of Accident—Burden of Proof.**—The fact that an accident happened to a passenger by the upsetting of the carrier's vehicle, is *prima facie* evidence of negligence, or want of the proper skill, on the part of the carrier, and throws upon the carrier the burden of proving that the accident happened without his fault.
3. **What will rebut this Presumption.**—In order to rebut this presumption, the carrier must show that his servant in charge of the vehicle was a person of competent skill, of good habits, and in other respects qualified and suitably prepared for the business in which he was engaged; that he acted upon the particular occasion with reasonable skill and with the utmost prudence and caution, and that the disaster was not occasioned by the least negligence, or want of skill or prudence, on his part.
4. **Contributory Negligence of the Passenger.**—A person is not chargeable with contributory negligence for acting erroneously in a position of sudden danger in which he is placed by the negligence or fault of another. If, therefore, a stage-coach is upset by the negligence of its driver, and the passenger therein, under the impulse of fear, acts in a manner which results in an injury to him, where, if he had remained calm, and kept his place, he would have escaped injury, he will not thereby be precluded from recovering damages of the carrier.

Schley, for the plaintiff; *Johnson*, *contra*.

BARBOUR, J., delivered the opinion of the court. — This is a writ of error to a judgment of the Circuit Court of the United States for the Fourth Circuit, and District of Maryland.

It was an action on the case, brought by the defendant in error against the plaintiff in error and Richard C. Stockton to recover

* Reported, 13 Pet. 181 (affirming *s. c. sub nom. Saltonstall v Stockton*, Taney's Dec. II).

Stokes v. Saltonstall.

damages for an injury sustained by his wife by the upsetting of a stage-coach in which she was a passenger and of which said Stockton and Stokes were the proprietors. The suit was brought in the name of Saltonstall alone; but there is in the record an agreement, signed by the counsel of the parties, stipulating, amongst other things, that the plaintiff might recover in it any damages which might be recoverable in an action by himself and wife, or by himself alone.

The declaration alleges that the injury complained of was caused by the negligence and want of skill of the driver, then in the employment of the said Stockton and Stokes and engaged in driving their coach in which the plaintiff's wife was a passenger at the time she received the injury. In the progress of the case, Stockton, one of the defendants, died, and his death having been suggested upon the record, the case proceeded against Stokes. He pleaded the general issue of "not guilty," on which issue was joined.

At the trial the defendant took a bill of exceptions to the ruling of the court, from which it appears that he asked the court to give to the jury sixteen several instructions, and the plaintiff asked of the court two instructions; all of which, as well those asked by the defendant as by the plaintiff, the court refused. But the court did give the jury the four following instructions, to wit:—

1. That the defendant is not liable in this action, unless the jury find that the injury of which the plaintiff complains was occasioned by the negligence, or want of proper skill or care, of the driver of the carriage in which he and his wife were passengers; and the facts that the carriage was upset and the plaintiff's wife injured are *prima facie* evidence that there was carelessness, or negligence, or want of skill, on the part of the driver, and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.

2. It being admitted that the carriage was upset and the plaintiff's wife injured, it is incumbent on the defendant to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged, and that he acted on this occasion with reasonable skill and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence, or want of skill or prudence, on his part, then the defendant is liable in this action.

3. If the jury find there was no want of proper skill, or care, or caution, on the part of the driver, and that the stage was upset by the act of the plaintiff or his wife in rashly or improperly springing from it, then the defendant is not liable to this action; but if the want of

Supreme Court of the United States.

proper skill or care of the driver placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover, although the jury may believe, from the position in which the stage was placed from the negligence of the driver, the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset, and although they may also find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage.

4. If the jury shall find that the driver was a person of competent skill, and in every respect qualified and suitably prepared for the business in which he was engaged, and that the accident was occasioned by no fault, or want of skill or care, on his part, or that of the defendant or his agents, but by physical disability arising from extreme and unusual cold, which rendered him incapable for the time to do his duty, then the defendant is not liable in this action.

Under these instructions, the plaintiff obtained a verdict for \$7,130, for which the court rendered a judgment in his favor; and from that judgment this writ of error is taken.

We consider it altogether unnecessary to notice any of the instructions asked for by the defendant and which the court refused to give, because those which they did give cover the whole ground; and therefore it depends upon their correctness whether the judgment is to be affirmed or not.

We think that the court laid down the law correctly in each and all of these instructions. It is certainly a sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods the carrier is answerable at all events, except the act of God and the public enemy. But although he does not warrant the safety of the passengers at all events, yet his undertaking and liability as to them go to this extent, that he or his agent, if, as in this case, he acts by agent, shall possess competent skill, and that, as far as human care and foresight can go, he will transport them safely. The principle is in substance thus laid down in the case of *Christie v. Griggs*.¹

So it is also in the case of *Aston v. Heaven*,² where it is said that coach-owners are not liable for injuries happening to passengers from accident or misfortune, where there has been no negligence or default in the driver; that the action stands on the ground of negligence, but that a driver is answerable for the smallest negligence.

¹ 2 Camp. 79, *ante*, p. 181.

² 2 Esp. 533.

Stokes v. Saltonstall.

The principle is thus laid down in 2 *Kent's Commentaries* (7th ed.), p. 769: "The proprietors of a stage-coach do not warrant the safety of passengers, in the character of common carriers; and they are not responsible for mere accidents to the persons of the passengers, but only for the want of due care." What the author understood to be due care will appear from this consideration, that in support of his proposition he refers to the two cases which we have just cited.

In *Story on Bailments*, many cases are collected together upon this subject in pages 376, 377, as illustrative of the principle, which is by that author laid down in these words: "If he (that is, the driver) is guilty of any rashness, negligence, or misconduct, or is unskilful, or deviates from the acknowledged custom of the road, the proprietors will be responsible for any injuries resulting from his acts. Thus, if the driver drives with reins so loose that he cannot govern his horses, the proprietors of the coach will be answerable. So, if there is danger in a part of the road, or in a particular passage, and he omits to give due warning to the passengers. So, if he takes the wrong side of the road, and an accident happens from want of proper room. So, if by any incaution he comes in collision with another carriage." To which we will add the further example: whenever there is rapid driving which, under the circumstances of the case, amounts to rashness. In short, says the author, he must in all cases exercise a sound and reasonable discretion, in travelling on the road, to avoid dangers and difficulties; and if he omits it, his principals are liable.

The only case which is recollected to have come before this court on this subject is that of *Boyce v. Anderson*.¹ That was an action brought by the owner of slaves against the proprietor of a steamboat on the Mississippi to recover damages for the loss of the slaves, alleged to have been caused by the negligence or mismanagement of the captain and commandant of the boat. The court distinguished slaves, being human beings, from goods; and held that the doctrine as to the liability of common carriers for mere goods did not apply to them, but that in respect of them the carrier was liable only for ordinary neglect. The court seem to have considered that case as being a sort of intermediate one between goods and passengers. We think, therefore, that any thing said in that case, in the reasoning of the court, must be confined in its application to that case, and does not affect the principle which we have before laid down. That principle, in our opinion, fully justifies the first and second instructions given by the court, except that part of

¹ 2 Pet. 150.

Supreme Court of the United States.

those instructions which relates to the *onus probandi*; and although we think this portion of the instructions as well founded in justice and law as the other, yet it rests upon a different ground. The first part has relation to the liability of the defendant; the second, to the question, on whom devolves the burden of proof? If the question were one of the first impression, we should, upon the reason and justice of the case, adopt the principle laid down by the Circuit Court. But although there is no case which could have the weight of authority in this court, we are not without a decision in relation to it. The very point was decided in 2 Camp. 80, where it is said by MANSFIELD, C. J., that he thought the plaintiff had made a *primâ facie* case by proving his going on the coach, the accident, and the damage he had suffered.

It is objected, however, in the printed argument which has been laid before us, that although the facts of the overturning of the coach and the injury sustained are *primâ facie* evidence of negligence, they did not throw upon the defendant the burden of proving that such overturning and injury were not occasioned by the driver's default, but only that the coachman was a person of competent skill in his business, that the coach was properly made, the horses steady, etc.

Now, taking that portion of the first and second instructions which relates to the burden of proof together, we understand them as substantially amounting to what the objection itself seems to concede to be a proper ruling, and what we consider to be the law. For, although in the first it is said that these facts threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault, yet in the second it is declared that it was incumbent on the defendant, in order to meet the plaintiff's *primâ facie* case, to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged; and that he acted on the occasion with reasonable skill and with the utmost prudence and caution.

This affirmative evidence, then, was pointed out by the court as the means of proving what was in terms stated in the form of a negative proposition before, — that is, that the accident was not occasioned by the driver's fault. The third instruction also announces a principle which we think stands supported by the soundest reason, and we should therefore adopt it as being correct if it were altogether a new question.

But this too is in accordance with the doctrine of Lord ELLENBOROUGH in 1 Starkie's Cases, 403, in which he says that to enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach; it is sufficient if he were placed, by the mis-

 Curtis v. Rochester and Syracuse Railroad Company.

conduct of the defendant, in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril; if that position was occasioned by the fault of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover.

The instruction which we are now considering is framed in the spirit of the principle which we have just stated, and we think it wholly unexceptionable.

The fourth instruction which was given to the jury was in favor of the defendant, now plaintiff in error, and therefore need not be considered. Upon the whole, we think that there is no error in the judgment. It is therefore affirmed, with costs.

Judgment affirmed.

 7. THE SAME SUBJECT.

CURTIS v. ROCHESTER AND SYRACUSE RAILROAD COMPANY.*

Court of Appeals of New York, 1859.

HON. ALEXANDER S. JOHNSON, *Chief Justice.*

" GEORGE F. COMSTOCK,	} <i>Judges.</i>
" SAMUEL L. SELDEN,	
" HIRAM DENIO,	
" SELAH B. STRONG,	} <i>Justices of the Supreme Court,</i>
" CORNELIUS L. ALLEN,	
" HIRAM GRAY,	
" MARTIN GROVER,	

and ex-officio Judges of the Court of Appeals.

1. **Presumption of Negligence from the happening of the Accident.**—The mere fact that an accident happens to the passenger while in the carrier's vehicle making the transit, without more, will not be *prima facie* evidence of negligence to charge the carrier; for, notwithstanding such evidence, the wrong which produced the accident may be imputable to a stranger, for whose conduct the carrier is in no wise responsible.
2. **Continued—Failure of Carrier's Means of Transportation.**—But where the accident is of such a nature that it appears that the wrong or negligence which produced it was the wrong or negligence of the carrier himself, or of some person for whose conduct in the premises the carrier is responsible, then proof of the accident will raise a presumption of negligence against the carrier. And this is the case where the

* Reported, 18 N. Y. 534.

 Court of Appeals of New York.

accident happens in consequence of the breaking, giving way, or failure of some of the carrier's means of transportation.

3. **Illustration—Case in Judgment.**—When, therefore, a passenger on a railway train was injured in consequence of the train running off the track at a switch, and the evidence left it uncertain whether the accident happened in consequence of the switch giving way, or in consequence of a spreading and breaking of the rails, it was held not error for the judge to tell the jury “that the fact of *this* accident occurring was of itself presumptive evidence of negligence on the part of the defendants.”
4. **Measure of Damages—Future Pain and Suffering.**—The damages recoverable for bodily pain and suffering by a person injured by the negligence of another are not limited to the suffering experienced before the trial, but extend to such future suffering as will probably result from the injury.

ACTION for damages received by a passenger on the defendant's railroad from the negligence of its servants. On the trial before Mr. Justice JOHNSON, at the Cayuga Circuit, the evidence was that the train containing the plaintiff ran off the track at Waterloo, at a switch. The proof left it uncertain whether the switch was deranged, or the accident resulted from the spreading and breaking of the rails. There was no evidence that there was any visible defect in the apparatus prior to the accident. The plaintiff's ankle was wrenched and her leg bruised. A running sore or ulcer succeeded upon the bruised place, which continued running, down to the time of the trial, nearly two years after the accident. There was considerable medical testimony in respect to the probability of the sore being healed at some future time, and as to the continued effect of the plaintiff's injuries in causing bodily pain and affecting her general health. The only exceptions were to the charge, and are sufficiently stated in the following opinions. The plaintiff had a verdict and judgment, which having been affirmed upon appeal at General Term, the defendant appealed to this court.

Alonzo C. Paige, for the appellant; *George Rathbun*, for the respondent.

SELDEN, J.—The judge charged the jury in this case “that the fact of *this* accident occurring was of itself presumptive evidence of negligence on the part of the defendants.” If by this the judge is to be understood as saying that, in cases of this kind, evidence of the mere happening of an accident, resulting in injury to the plaintiff, without proof of any of the circumstances under which it occurred, establishes *prima facie* the charge of negligence, I am not prepared to assent to the proposition. Carriers of passengers are not insurers; and many injuries may occur to those they transport for which they are not responsible. They are, for obvious reasons, held bound to exert the utmost care and vigilance to secure the safety of the passengers; and are responsible for the slightest negligence.

Curtis v. Rochester and Syracuse Railroad Company.

But injuries may often happen through the fault or misconduct of those whose acts are in no way chargeable to them. In travelling in stage-coaches, upon ordinary roads, such injuries would be very frequent, because, in such cases, the proprietors of the coach do not construct the roads, nor control those who travel upon them. For a large portion of the accidents, therefore, which result from defects in the road or collisions with other vehicles, the proprietors would not be liable.

The carrier, however, is in all cases bound to provide a safe and secure carriage for the transportation of the passengers; and nothing can exempt him from this responsibility but the existence of some latent defect which no reasonable degree of human skill and foresight could guard against; and this obligation extends to every species of appliance belonging to the carrier and used by him in the business in which he is engaged. Consequently, whenever it appears that the accident occurred through some defect in the vehicle or other apparatus used by the carrier, a strong presumption of negligence arises, founded upon the improbability of the existence of any defect which extreme vigilance, aided by science and skill, could not have detected.

The cases in which the carriers would be exempt from responsibility would be far less frequent where the transportation is upon railroads than where it is upon common roads, because railroad companies have the entire control of the track and of all engaged in its use. Still, accidents may occur from a multitude of causes, even upon a railroad, for which the company is not responsible. If obstructions are placed by strangers upon the road, either through accident or design, the company is not responsible for the consequences, unless its agents have been remiss in not discovering them. The straying of cattle or horses upon the roads causes numerous accidents which are not chargeable to the company. If a drunken man falls asleep, or a deaf man incautiously walks upon the road, in consequence of which a train is unavoidably thrown from the track and a passenger is injured, he is without redress as against the company. So if a careless driver, in crossing a track, fails to get his vehicle out of the way of an approaching train. How then can it be assumed, without proof of any sort, when an accident has occurred, that it was caused by some carelessness on the part of the agents of the company, and not by any or either of these numerous causes?

In regard to the carriages and other apparatus used for the carrying of passengers, railroad companies are under the same obligation as that already alluded to in the case of the carrier upon common roads. They make and own their road, and have the exclusive control of that and of

 Court of Appeals of New York.

every part of the machinery and apparatus used in connection with it. Passengers have no means of knowing nor any power of remedying its defects, but are forced to trust their lives and persons to the care and watchfulness of the agents of the company. The latter, therefore, is bound to see that the road and all its appurtenances are in perfect order and free from any defect which the utmost vigilance, aided by the highest degree of knowledge and skill, could discover or prevent.

Consequently, whenever it appears that the accident was caused by any deficiency in the road itself, the cars, or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that every thing was in order immediately arises, it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have foreseen or discovered it.

If it be said that upon the same principle upon which negligence is presumed in such a case it should be presumed in every case, on account of the high degree of improbability that a serious accident of any kind should occur without some degree of negligence, the answer is plain; and to present this distinction is the object of most that has been said. There may be a presumption of negligence in every case; but where nothing is known in regard to the cause of the accident, the negligence may as well have been that of some one residing in the vicinity of the road, or of some stranger, of whom numbers come in contact with it every day, as of any of the employees of the company; while if it appears that the mischief has resulted from a defect in some part of the apparatus of the company, the negligence, if any, must have been that of some one for whose acts and omissions the company is liable, it being well settled that the carrier is responsible for the negligence or want of skill of every one who has been concerned in the manufacture of any portion of its apparatus.¹

The cases in which it has been said that a presumption of negligence arises from the mere proof that an accident has occurred will appear, if examined, not to conflict materially with these principles; and some of them are, I think, illustrative of the distinction just suggested. The leading cases on the subject are those of *Christie v. Griggs*,² *Stokes v. Saltonstall*,³ *Carpue v. London and Brighton Railway Company*,⁴ and *Laing v. Colder*.⁵

In *Christie v. Griggs*, where Sir JAMES MANSFIELD is supposed to have

¹ *Hegeman v. Western R. Co.*, 13 N. Y. 9, *ante*, p. 160; *Ware v. Gay*, 11 Pick. 106; *In-galls v. Bills*, 9 Metc. 1, *ante*, p. 112.

² 2 Camp. 79, *ante*, p. 181.

³ 13 Pet. 192, *ante*, p. 183.

⁴ 5 Q. B. 747.

⁵ 8 Pa. St. 479.

Curtis v. Rochester and Syracuse Railroad Company.

laid down the proposition in question, it was proved that the injury was caused by the breaking of the axletree of the coach, upon the top of which the plaintiff was seated; and it was in view of this proof that the CHIEF JUSTICE made the remark that "the plaintiff had made a *primâ facie* case by proving his going on the coach, the accident, and the damage he had suffered." There is no doubt that in such a case negligence should be presumed, for the reasons which have been given.

In the case of *Stokes v. Saltonstall*, which was also an action against the proprietors of a line of stage-coaches, the court instructed the jury that the "facts that the carriage was upset and the plaintiff's wife injured were *primâ facie* evidence that there was carelessness, or negligence, or want of skill, on the part of the driver; and threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault." Taken abstractly, this instruction, which was sustained by the court, might seem to be in conflict with the principles here contended for; but if understood in reference to the proof, it is otherwise. The plaintiff has proved not only the accident and the injury, but that the passengers had remarked that the driver appeared intoxicated, and so told the agent of the proprietors; that the road was perfectly level, and not dangerous or difficult; and that the reckless conduct of the driver had called out repeated remonstrances from the passengers, which were wholly unattended to. Here was ample proof of negligence, and the judge must have had these circumstances in view when he made his remarks to the jury. The happening of the accident, under the circumstances proved, was undoubtedly *primâ facie* evidence of negligence.

The other two cases were actions for injuries upon railroads. In that of *Carpue v. London and Brighton Railway Company*, it appeared that the position of the rails had been somewhat deranged at the spot where the injury took place; and the CHIEF JUSTICE charged the jury that it having been shown that the exclusive management both of the machinery and the railway was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced. This is in perfect accordance with the principles which have been here advanced.

Laing v. Colder is perhaps the strongest case in support of the doctrine against which we contend. When that case was heard *in banco*, BELL, J., said, "the mere happening of an injurious accident raises, *primâ facie*, a presumption of neglect, and throws upon the

Court of Appeals of New York.

carrier the *onus* of showing it did not exist." But the charge of the judge at the circuit upon which the question arose was not so broad. He instructed the jury that "in the *present* case the presumption was there had been negligence," — a charge fully justified by the proof, which was that the accident occurred while the car was crossing a bridge, which was so narrow that the plaintiff's hand, lying outside the car-window, was caught by the bridge and his arm broken. It was palpable negligence on the part of the company so to construct the bridge.

In no instance that I am aware of has it been said by any judge that negligence, on the part of the carrier, was to be presumed from the mere happening of an accident, except where the facts proved in the particular case fully warranted the presumption upon the principles here insisted upon.

The views here presented are, I think, sustained by the opinion of this court in the case of *Holbrook v. Utica and Schenectady Railroad Company*.¹ RUGGLES, J., there says: "In actions like the present, the burden of proving that the injury complained of was caused by the defendant's negligence lies on the plaintiff. The same rule applies as in an action for an injury to a passenger in a stage-coach. It generally happens, however, in cases of this nature, that the same evidence which proves the injury done proves also the defendant's negligence, or shows circumstances from which strong presumptions of negligence arise, and which cast on the defendant the burden of disproving it. For example, a passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown."

It does not follow from what has been said that the judgment in this case is to be reversed for error in that part of the charge referred to. The very witness called by the plaintiff upon the trial proved enough of the circumstances of the case to warrant the presumption of negligence. It was clear from his testimony that the accident was caused by some defect in the track, and in all probability by the misplacement of the switch. It was immaterial, however, whether it was this, or the spreading of the rails, as the company sought upon cross-examination to show, which threw the train from the track. In either case the presumption of negligence would arise. The judge was fully warranted in instructing the jury that the occurrence of the accident, under the circumstances disclosed by the evidence, authorized the presumption of negligence.

¹ 12 N. Y. 236.

Curtis v. Rochester and Syracuse Railroad Company.

Did he do more than this? He did not say to the jury, in the language of Judge BELL in *Laing v. Colder*, that "the mere happening of an injurious accident" raises a presumption of negligence; but his words were that "the fact of *this* accident occurring" was presumptive evidence, etc. The effect is attributed, not to any and every accident, but to this particular accident. A verdict like this, sustained as it is by ample evidence, ought not to be disturbed by a construction which would make the charge a mere abstraction, not called for by the exigencies of the case, provided any other interpretation is admissible. There is no reason to suppose that the jury were misled. They were carefully instructed that if the injury was the result of pure accident, without any neglect of the defendants, the plaintiff could not recover; and under the view which has been taken, the charge, so far as the exception under consideration is concerned, may, I think, be properly sustained.

A question also arises upon that part of the charge in which the jury were told that in estimating the damages they would be justified in taking into consideration "the bodily pain and suffering which the plaintiff suffered, or *was likely to suffer*, in consequence of the neglect of the defendants." This instruction, in so far as it relates to future pain and suffering, is clearly erroneous; and if it had not been subsequently modified, the error would, I think, have been necessarily fatal to the judgment. There is no doubt that bodily pain and suffering is a proper item of damages in such cases.¹ Nor is the estimate necessarily limited to suffering which is past, where the proof renders it reasonably certain that future pain and suffering is inevitable. In estimating the pecuniary loss in such cases, all the consequences of the injury, future as well as past, are to be taken into consideration; and there seems to be no reason why a different rule should prevail in respect to bodily pain and suffering. But the objection to the charge is that it authorizes an allowance of damages for future pain which is rendered probable merely. Damages are to be proved, and none can be allowed except such as are shown by the proof to be, at least to a reasonable degree, certain. The error, however, was corrected upon the trial. The judge, upon his attention being called to the point, further instructed the jury that "future damages could only be awarded when it is rendered reasonably certain, from the evidence, that such damages will inevitably and necessarily result from the original injury." With this qualification,

¹ *Ransom v. New York etc. R. Co.*, 15 N. Y. 415.

Court of Appeals of New York.

I see no objection to the charge on this subject, and this exception also should therefore be overruled.

The judgment should, I think, be affirmed.

GROVER, J. — August 7, 1852, the plaintiff took passage in the defendants' cars at Geneva for Auburn. As the train was passing Waterloo, it ran off the track, and the plaintiff was injured. The court, among other things, charged the jury that the fact of this accident occurring was of itself presumptive evidence of negligence on the part of the defendants, and it lay with them to explain it and to prove that they were not negligent, in order to discharge them from liability to the plaintiff; to which the defendants excepted. The plaintiff was bound to prove her cause of action. That was that she had received an injury caused by the negligence of the defendants. The negligence of the defendants must be proved by the plaintiff, as well as the reception of the injury. It was not enough for her to prove that while a passenger upon the defendants' cars she was injured. In this case, proof was given that the cars ran off the track, and that this occasioned the injury. It was in reference to this evidence that the judge charged the jury that the fact of this accident occurring was presumptive evidence of negligence on the part of the defendants. The question is, whether the plaintiff was bound to go further, and show the particular cause of the cars being thrown from the track, or whether it was for the defendants to show that it was accidental, and without neglect upon their part. This question may be determined upon principles applicable to all modes of carrying passengers. It is the duty of all engaged in this business, in any mode, to use care to secure the safety of the passenger, proportioned to the danger incident to the mode of conveyance. In case this care is applied, as a general result the safety of the passenger will be secured, so far as that safety depends upon the state or condition of any of the means provided by the carrier and used in the business; if there is no imperfection in any of these, and suitable caution is employed by those engaged their application, every thing dependent thereon will accomplish the end in view. This is as certain as the laws of mechanics. When, therefore, an injury is received from a derangement of any thing employed by the carrier, the presumption necessarily arises that there existed somewhere an imperfection in the machinery employed, or negligence in its application. It is the duty of the carrier to provide perfect machinery, and if he has failed in this, it devolves upon him to show the excuse, if any. This is the rule applicable to all cases where a party seeks exoneration from a duty imposed upon him by law or incurred by contract. The plaintiff has established

Curtis v. Rochester and Syracuse Railroad Company.

his cause of action when he has shown a failure to perform the duty, from which he has sustained an injury. It is for the defendant, then, to show the facts relieving him from responsibility in the particular case. This imposes no hardship upon the defendant in this class of cases. The whole management is exclusively under his control. He has ample means to show the true cause of the difficulty. The plaintiff knows nothing about it. He takes passage with the carrier, who, instead of conveying him safely, inflicts an injury upon him by the failure of some part of the machinery employed by him. In many cases, it would be impossible for the plaintiff to ascertain the particular defect, and I think no such obligation is imposed upon him by the rules of evidence. The authorities are uniform in favor of the rule held by the judge.¹ The same rule is laid down by the elementary writers.² The defendants' counsel cites the case of *Holbrook v. Utica, etc. Railroad Company*³ in opposition to the rule. I understand that case as substantially sustaining the rule as laid down by the judge in his charge in this case. RUGGLES, J., says that if the witness who swears to the injury testifies also that it was caused by a crush in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises. Just so when it is proved that the injury arose from any derangement, crush, or displacement of the track or cars.

The exception to that portion of the charge holding that the plaintiff could recover a compensation for bodily pain suffered, or that she was likely to suffer, is general; and it is settled that such an exception is unavailing when any portion of the charge thus excepted to is correct. In *Ransom v. New York and Erie Railway Company*,⁴ it was decided by this court that bodily pain and suffering arising from an injury was a proper subject for pecuniary compensation. This exception does not render it necessary to examine that portion of the charge holding that the plaintiff could recover for pain and suffering likely to be suffered. In this case, the judge, I think, laid down the true rule, in substance, in regard to future pain and suffering, in another portion of his charge: that the plaintiff could only recover damages for such pain and suffering as the evidence rendered reasonably certain would necessarily result from the injury. But, as remarked above, the exception is too general to present any question as to future pain.

The judge was correct in refusing to charge the jury, as requested.

¹ *Stokes v. Saltonstall*, 13 Pet. 181, *ante*, p. 183; *Carpue v. London etc. R. Co.*, 5 Q. B. 747; *s. c. Dav. & M.* 608; 3 Eng. Rail. Cas. 692; 8 Jur. 464; 13 L. J. (Q. B.) 133; *Holbrook v. Utica*

etc. R. Co., 16 Barb. 113, and cases there cited.

² Ang. on Car., § 569; 2 Greenl. on. Ev. 222.

³ 12 N. Y. 236.

⁴ 15 N. Y. 415.

 Grounds on which Liability arises.

that the uncontradicted proof shows that the switch was rightly placed for the train in which the plaintiff was a passenger, and awaiting its approach, and that this rebutted any presumption of negligence arising from the accident. There was evidence tending to show that the train ran off the track at the point of approach to the switch. This was evidence tending to show that the switch was improperly placed, and proper for the consideration of the jury upon that question. The judgment should be affirmed.

DENIO and COMSTOCK, JJ., did not sit in the case; all the other judges concurring.

Judgment affirmed.

 NOTES.

I. GENERAL DOCTRINES.

§ 1. **Grounds on which this Liability rests.**—The carrier is under a duty to carry the passenger safely, so far as human care, foresight, and skill will enable him to do it. This duty, it is said, exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry, or the service undertaken is gratuitous, an action lies against the carrier for a negligent injury to the passenger.¹ The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands. The liability of the carrier is the same whether the action is brought upon the contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same; and when there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is coextensive with the contract.²

Whenever the relation of carrier and passenger exists as defined in the preceding chapter,³ the law steps in and determines the measure of the carrier's duty, according to the circumstances attending this relation. We apprehend that the measure of the carrier's duty is the same in all cases where the relation is voluntarily assumed, whether for reward or gratuitously. But where the relation is not voluntarily assumed,—as, where the person injured is a trespasser upon the vehicle of the carrier,—it is obvious that the measure of the carrier's liability is different. Towards such a person he is not responsible for that high degree of care exacted towards other passengers; and in the view of some courts, he is responsible only for a wanton injury. How far this liability which the law attaches to the office of a public carrier is subject to be limited by *express contract*, is considered in a future chapter.

¹ Phila. etc. R. Co. v. Derby, *ante*, p. 31;
Str. New World v. King, *ante*, p. 175.

² Carroll v. Staten Island R. Co., 58 N. Y.
126.

³ *Ante*, Chap. 1V.

Notes.

§ 2. Overruled Cases holding Carriers of Passengers liable as Insurers. — Two or three old cases give countenance to the idea that a common carrier of passengers is liable as an insurer of their safe carriage. Thus, in *Bremner v. Williams*,¹ BEST, C. J., said, "I consider that every coach proprietor warrants that his stage-coach is equal to the journey he undertakes." But, he continued, "the counts go on to charge *negligence*, and the case may be decided upon that ground also;" and, upon examination of the facts proved, he held that there was evidence of negligence to support the verdict which the jury had rendered for the plaintiff.

In *Sharp v. Grey*,² an axletree of defendant's coach broke on the journey, injuring the plaintiff, who was a passenger. It appeared that the axletree was an iron bar, which, excepting the arms projecting into the wheels, was enclosed in a frame of wood consisting of four pieces bound together by clamps of iron. The clamps were fastened with screws. Before the journey, the defendant's servant had examined this part of the vehicle in the usual way, when no defect was obvious to the sight; but upon investigation after the accident, a defect was discovered in that portion of the iron bar embedded in the wood-work, which could only be examined by unscrewing the iron clamps and taking off the wooden frame. A mail-contractor testified that it was not usual, previous to journeys, to examine the iron of the axletree by opening the wooden frame, and that such a practice would be productive rather of insecurity than of safety. The maker of the defendant's coach swore that the whole vehicle had been made of the best materials; that the coach was not new, but that the iron of the axletree was rendered more tough by use, and was less liable to accident after wear than at first starting. On this evidence, it was contended that there had been no want of due care on the part of the defendant, and that the plaintiff's calamity was the result of inevitable accident, for which the defendant was not responsible. TINDAL, C. J., directed the jury to consider whether there had been on the part of the defendant *that degree of vigilance which was required by his engagement to carry the plaintiff safely*. The jury having found for the plaintiff with £500 damages, *Andrews*, serjt., moved to set aside the verdict, on the ground that the defendant had conducted his business with all the caution that could be reasonably required, that the jury had been misdirected, and that the verdict was against the evidence. He contended that a carrier of goods undertakes to deliver at all hazards, but that a carrier of passengers is not responsible for accidents which happen in spite of every precaution. "In *Christie v. Griggs*,"³ said he, "it was held that the proprietor of a stage-coach was not answerable for any damages that might happen to a passenger from the coach being overturned by a mere accident. The learned judges then delivered the following opinions: —

"PARK, J. — I am of opinion that no rule ought to be granted. This was entirely a question of fact, and the damages are not excessive. It is clear that there *was* a defect in the axletree; and it was for the jury to say whether the accident was occasioned by what, in law, is called negligence in the defendant, or not. The CHIEF JUSTICE expresses no dissatisfaction at the verdict, and it ought not to be disturbed."

"GASELEE, J. — I am of the same opinion. The burden lay on the defendant to

¹ 1 Car. & P. 414.² 9 Bing. 457; s. c. 2 Moo. & Scott, 621.³ 2 Camp. 79, *ante*, p. 181.

 Not Insurers, but liable for Negligence.

show there had been no defect in the construction of the coach. Whether there had been or not, was a question of fact, on which the jury have determined. In *Christie v. Griggs*, the accident was occasioned by a kennel which crossed the road, and not by any defect in the vehicle.

“BOSANQUET, J. — I am of opinion that no rule should be granted to disturb this verdict. The CHIEF JUSTICE held that the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axletree. If so, when the coach started it was not *roadworthy*, and the defendant is liable for the consequence upon the same principle as a ship-owner who furnishes a vessel which is not seaworthy.

“ALDERSON, J. — I am of the same opinion. A coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation. The injury in the present case appears to have been occasioned by an original defect of construction; and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles and his passengers be without remedy.”¹

It is perfectly obvious that this case is no authority for the position that the liability of a carrier of passengers is that of an insurer of the safety of his vehicles. But it was erroneously quoted as so holding by the Court of Appeals of New York, in 1862. And that court accordingly laid down the rule that a common carrier of passengers is bound absolutely, and irrespective of negligence, to furnish a roadworthy vehicle; and the conclusion was that the railroad company was liable for injuries to a passenger caused by a crack in the iron axle of the car, although the defect could not have been discovered by any practicable mode of examination.² This case, however, so far as it declares this rule, is overruled by subsequent cases in the same court.³

§ 3. Such Carriers not Warrantors of their Vehicles and Roads, but liable only for Negligence. — The rule laid down in the last cited case is not the law either in Great Britain or the United States. The settled law is that a common carrier does not warrant the safety of his vehicles and road against all accidents and contingencies, but is liable only for negligence.⁴ This being the case, the

¹ *Sharp v. Grey*, 9 Bing. 457; *s. c.* 2 Moo. & Scott, 621.

² *Alden v. N. York etc. R. Co.*, 26 N. Y. 102.

³ *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 133, 139; *McPadden v. New York etc. R. Co.*, 44 N. Y. 478; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 290; *Croghan v. New York etc. R. Co.*, 18 Alb. L. J. 70.

⁴ *Readhead v. Midland R. Co.*, *ante*, p. 124; *Ingalls v. Bills*, *ante*, p. 112; *Christie v. Griggs*, *ante*, p. 181; *Aston v. Heaven*, 2 Esp. 533; *Crofts v. Waterhouse*, 3 Bing. 319; *s. c.* 11 J. B. Moo. 133; *Curtis v. Drinkwater*, 2 Barn. & Adol. 169; *Boyce v. Anderson*, 2 Pet. 150; *McKinney v. Neil*, 1 McLean, 540; *McPadden v. New York etc. R. Co.*, 44 N. Y. 478 (reversing 47 Barb. 247); *Ford v.*

London etc. R. Co., 2 Fost. & Fin. 730; *Israel v. Clark*, 4 Esp. 259; *Burns v. Cork etc. R. Co.*, Irish Rep. 13 C. L. (N. S.) 543; *Pym v. Great Northern R. Co.*, 2 Fost. & Fin. 619, 621; *Maury v. Talmadge*, 2 McLean, 157; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; *Croghan v. New York etc. R. Co.*, 18 Alb. L. J. 70; *Sullivan v. Phila. etc. R. Co.*, 30 Pa. St. 234; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225; *Stockton v. Frey*, 4 Gill, 406; *Frink v. Potter*, 17 Ill. 406; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 223, 231; *Fairchild v. California Stage Co.*, 13 Cal. 599; *McClary v. Sioux City etc. R. Co.*, 3 Neb. 45; *Sawyer v. Hannibal etc. R. Co.*, 37 Mo. 240, 260. And see *Keith v. Pinkham*, 43 Me. 501; *White v. Boulton*, 1 Peake, 113.

Notes.

general rules which obtain in the law of negligence come into effect, except so far as they are modified by the circumstance that the carrier is responsible for an extraordinary degree of care: the negligence of the carrier must have been a proximate or juridical cause of the injury,—or, to borrow an expression coined by Lord CAIRNS, it must have been *incuria dans locum injuriæ*; ¹ and the passenger himself must not have been guilty of contributory negligence.²

§ 4. Bound to use Extraordinary Care.—(1.) *General Expressions of the Doctrine.*—It is frequently said by the courts that such carriers are bound to exercise extraordinary care and skill to secure the safety of their passengers. This doctrine will be found in various cases, embodied in such expressions as these: “The utmost degree of care and skill in the preparation and management of the means of conveyance;”³ “all precautions, as far as human foresight will go.”⁴ Another eminent court has sanctioned an instruction which told the jury that a common carrier of passengers is bound to use greater than ordinary care,—such care as is used by very cautious persons; and if any reasonable skill on his part could have prevented the accident, the defendant is liable.”⁵ “Every person who contracts for the conveyance of others is bound to the utmost care and skill; and if through any erroneous judgment on his part any mischief is occasioned, he must answer the consequences.”⁶ “Carriers of passengers for hire are bound to exert the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence, or want of skill, either in themselves or their servants. They are bound to use such care and diligence as the most careful and vigilant man would observe in the exercise of the utmost prudence and foresight.” This language, used in charging a jury, is held well sustained by the authorities.⁷ “A carrier of either goods or passengers is bound to provide a carriage or vehicle perfect in all its parts, in default of which he becomes responsible for any loss or injury that may be suffered, provided it happened without negligence or misconduct on the part of the party injured. A carrier of passengers is bound to omit no precaution that may conduce to their safety. He is bound to guard beforehand against every apparent danger that may beset them.”⁸

(2.) *Expressions in Railway Cases.*—“The law, in tenderness to human life and limb, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence.”⁹ “When carriers undertake to convey passengers by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence.”¹⁰ Such carriers are bound to carry safely those whom they take into their carriages, as far as human foresight and care will go, and are bound “to use the utmost care and diligence of very

¹ Metropolitan R. Co. v. Jackson, 3 App. Cas. 193, 198.

² See the next chapter.

³ Ang. on Car., § 523; Gardiner, J., in Hegeman v. Western R. Corp., 13 N. Y. 9, 24, ante, p. 169.

⁴ 2 Kent's Comm. 602; Gardiner, J., ut supra.

⁵ Edwards v. Lord, 49 Me. 279.

⁶ Lord Ellenborough, in Jackson v. Tolle, 2 Stark. 37; s. c. 3 Eng. Com. Law, 233.

⁷ Sales v. Western Stage Co., 4 Iowa, 547.

⁸ Gibson, C. J., to the jury in New Jersey R. Co. v. Kennard, 21 Pa. St. 203, 204; approved by the Supreme Court, 21 Pa. St. 209.

⁹ Staples, J., in Baltimore etc. R. Co. v. Wightman, 29 Gratt. 431, 445.

¹⁰ Ibid.

Bound to Extraordinary Care.

cautious persons.”¹ They are “bound to the most exact care and diligence, not only in the management of the train and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers.”² They are “bound to exercise all the care and skill which human foresight and diligence can suggest.”³ “‘As far as human care and foresight will go,’ has become almost a familiar form of expression in stating the rule of duty.”⁴ “They are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers.”⁵ An instruction that “if the defendant could have prevented the accident by the utmost human sagacity and foresight with respect to their track, then the defendant is liable,” has been held to be established law; and it was held no error to refuse to charge “that the utmost human sagacity required of the defendant did not require of the defendant to take such extraordinary measures in constructing, operating, and maintaining its railroad as are not and have not been in use in the constructing, operating, and maintaining of railroads.”⁶

“When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of ‘gross.’”⁷

It has been held, in a well-considered case in New Hampshire, not error to tell the jury that a railway company, in the carriage of passengers, is bound to use “the utmost care and prudence of a very cautious person.” This declaration of law the court found to be not only in accordance with the elementary books, but sustained by the adjudged cases. “It is true,” said the court, “that the terms used do not furnish an exact measure of the care required, but that difficulty is inherent in the nature of the subject. It has, however, this advantage, that it conforms substantially to the ordinary definition of the highest degree of care required of bailees of goods, and has, therefore, the sanction of long use.”⁸

“Railway companies who are carriers of passengers are required to use all the means reasonably in their power to prevent accident. It is not necessary, to charge them with liability, that they be guilty of great negligence. It is enough if the accident was caused solely by any negligence on their part, however slight, if by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained.”⁹

“When a railroad company engage in the business of common carriers, [of passengers] they undertake that the road is in good travelling order and fit for

¹ *Oliver v. New York etc. R. Co.*, Edm. Sel. Cas. 589.

² *Shaw, C. J.*, in *McElroy v. Nashua etc. R. Corp.*, 4 Cush. 400, 402.

³ *Brown v. New York etc. R. Co.*, 34 N. Y. 404, 408 (reversing s. c. 31 Barb. 385).

⁴ *Bowen v. New York etc. R. Co.*, 18 N. Y. 408, 411.

⁵ *Virginia etc. R. Co. v. Sanger*, 15 Gratt. 230, 236.

⁶ *Union Pac. R. Co. v. Hand*, 7 Kan. 380, 392.

⁷ *Grier, J.*, in *Phila. etc. R. Co. v. Derby*, 14 How. 486, *ante*, p. 31.

⁸ *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 318.

⁹ *Mr. Justice Davis* to the jury in *Seymour v. Chicago etc. R. Co.*, 3 Biss. 43.

Notes.

use, and that the engines and carriages employed are roadworthy and properly constructed, and furnished according to the present state of the art; and if an injury results from the imperfection of the road, the carriages, or the engines, the company are liable, unless the imperfection was of a character in no degree attributable to their negligence. They are also bound for a due application, on the part of their servants and agents, of the necessary attention, art, and skill: and if the injury to the plaintiff might have been avoided by the utmost degree of care and skill on the part of the agents and servants of the company, they are liable." It is also proper to tell a jury that the company will be liable if the injury which happened might have been avoided by the conductor "by the most skilful and prompt use of all the means in his power."¹ The Supreme Court of Illinois has stated the rule to be, that "carriers of passengers for hire are bound to use the utmost care and diligence in providing for their safety, by the use of sufficient and suitable modes of conveyance, in order to prevent those injuries which human care and foresight can guard against. Having thus provided the means of transportation, they are in like manner to use the utmost care and diligence in managing, directing, and using those means, so that, as far as human care and foresight can go, they may guard against injury. Having done all that human care and foresight can do, reasonably, an injury happening, they are not liable. Pure accidents will excuse them. They are not liable at all events, and the negligence of the passenger producing the injury, without their fault, will also relieve them from liability. But the magnitude of the value of human life is such that it requires of carriers of passengers this degree of care and foresight. * * * When, by the increased facilities for travel, so large a portion of the population of our country are intrusted to the care of carriers of passengers by railroads and steamboats, and accidents are so lamentably frequent, it would not be proper to relax this rule, for upon it depends the safety of the travelling public."² But in a later case, quoted in the next section, these expressions are much modified.

In an important case in New Hampshire,³ the trial court instructed the jury as follows: "The burden of proof is on the plaintiff to show that the accident occurred under such circumstances that the defendants were liable for the consequences. Defendants are not insurers, and are not liable if they have been in no fault, but they are liable for the smallest negligence. They must provide a good track; and if there be the least failure in this, they are answerable for any injury that may happen in consequence. Defendants are bound to use the highest degree of care which a reasonable man would use. This does not mean the utmost degree of care which the human mind is capable of imagining, or, in other words, that care enough must be taken to render the passengers perfectly safe; such a rule would require so great an expenditure of money, and the employment of so many hands. Defendants must use such a degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue the business. The law does not require such particular precaution as it is apparent, after the accident, might have prevented the injury, but such as would be dictated by the utmost care and prudence of a very cautious

¹ Nashville etc. R. Co. v. Messino, 1 Sneed (Tenn.), 220. Opinion of the court by Caruthers, J.

² Chicago etc. R. Co. v. George, 19 Ill. 510, 517.

³ Taylor v. Grand Trunk R. Co., 48 N. H. 304.

 Bound to Extraordinary Care.

person before the accident, and without knowledge that it was about to occur. Defendants must use the highest degree of practicable care and diligence that is consistent with the mode of transportation adopted. They are not obliged to use every possible preventive that the highest scientific skill might have suggested. It is said that they must use the best precautions in known practical use to secure safety, the most approved modes of construction and machinery in known use in the business; but this doctrine must be taken with the qualification that they are not obliged to introduce improvements if the expense of introducing them is much greater in proportion than the increase of safety thereby attained."

The Supreme Court thought that the general view of the court below taken in this charge as to the duties and degree of care imposed upon carriers was correct. They are bound to exercise the highest degree of care and diligence in the conduct of their business, and are liable for the smallest negligence. "This measure of care," said the court, "is applicable to carriers of passengers by stage-coaches, where the rate of speed is not much above six miles per hour; and it is very obvious that a higher degree of care and skill is demanded in the transportation of passengers by steam on a railroad, where the speed is so much greater." The court, after reviewing the authorities at length, state that they sustain the general view taken by the judge in his instruction to the jury; "and," continued the court, "the question is whether in the illustrations given there was any thing calculated to mislead them. The objection most urged is the statement that defendants must use such a degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue business. This is substantially the language of Judge Redfield,¹ and is apparently based upon the idea that the rule calling for the utmost degree of care, vigilance, and precaution must be understood not to require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted, and render it impracticable. This is the doctrine of *Tuller v. Talbot*,² where it is also said that this rule does not require the utmost degree of care which the human mind is capable of inventing, as such a rule would involve the expenditure of money and the employment of hands so as to render it perfectly safe, and would prevent all persons of ordinary prudence from engaging in that kind of business. But the rule *does* require that the highest degree of practicable care and diligence should be used that is consistent with the mode of transportation adopted. To the general views thus expressed we perceive no objection. Indeed, it is quite manifest, we think, that in fixing upon the measure of the obligation of common carriers by railway to the travelling public, it is proper to consider how far it is reasonably practicable for them to go, in view of the expenditures that might be required; and, looking at the subject as a whole, we think it could never have been intended to fix upon a measure of care that would render it practically impossible to continue this mode of transportation.

"At the same time, the standard of care and diligence for a particular railroad cannot be made to depend upon its pecuniary condition or the amount of its earnings; but having undertaken to carry passengers in that mode, its duty is to provide a track, rolling-stock, and all other agencies suited to the nature and

¹ 2 Redf. on Rys. (3d ed.) 187.

² 23 Ill. 357.

Notes.

extent of the business it proposes to do, and the measure of its care and diligence is not to fluctuate with the changes in its revenues. A direction to the jury, therefore, that should make the degree of care required turn upon the pecuniary means of this particular road would be erroneous. The part of the charge particularly objected to is the direction that 'defendants must use such degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue the business.' This might, and probably would, be understood to require of the defendants all practicable care to the extent of their means, which would make the ability of the corporation the measure of the care and diligence required; and that obviously is not the true test, and, judging from other parts of the instructions, it was not so intended. Still, the terms used are so explicit that there is reason to fear that the jury may have been misled, and induced to require as a standard a higher degree of care and diligence than the law actually demands. It would be quite likely to be so if it appeared that the corporation was receiving a large income from this business beyond the expenses. If, on the other hand, it appeared that the receipts did not equal the running expenses, the jury might feel at liberty to exact a lower degree of care and diligence.

"In respect to common highways, it has been decided in this State that the standard by which their sufficiency is to be tested is not to be expanded or contracted by the wealth or poverty of the town,¹ and we think the same rule is applicable to the proprietors of railroads. They are bound to keep them in suitable repair, and to operate them with suitable care and diligence, considering the character and extent of the use to which they are applied. As before remarked, the passage under consideration is in terms much like the passage in 2 *Redfield on Railways*, 187; but upon a close examination of his statement it will not be found that the author intended to announce the doctrine that the degree of diligence was to be measured by the revenues of the particular railroad, but that in fixing a general standard of care and diligence there should not be so much required as to render this mode of conveyance impracticable.

"The objection to the passage in question now before us is the danger that the jury may have understood that the defendants were bound to use all practicable care and skill to the extent of their means; and as we do not know that their means were not understood to be ample, we cannot be sure that the jury were not misled. The jury in this case have found that there was gross negligence, and it might, perhaps, be urged that this finding shows that no harm was done by the instructions in question. We think, however, that in determining what was gross negligence the jury would naturally and properly be influenced by the degree of care and diligence which they supposed the law required; and, if that standard was carried too high, they might also come to a wrong conclusion as to what was gross negligence. We therefore are constrained to hold that, in respect to the particular direction under consideration, the charge was erroneous."²

(3.) *Expressions in Stage-Coach Cases.*— "The proprietors of stage-coaches which ply between different places, and carry passengers for hire and compensation, are responsible for all accidents and injuries happening to the persons of

¹ *Winship v. Enfield*, 42 N. H. 197, 208.

² *Per Bellows, J.*, 48 N. H. 316, 318.

Bound to Extraordinary Care.

the passengers which could have been prevented by human care and foresight.”¹ “Passenger-carriers are liable for injuries resulting from even the slightest negligence. * * * They are bound to use the utmost care and diligence of cautious persons to prevent injury to passengers.”² “The carrier cannot be said to have fulfilled the requirements of the law so long as there exists any known want of safety in his coaches, harness, etc., whether arising from defectiveness of materials or workmanship, or faultiness of the principles on which they are constructed, for which there is any known remedy used wisely as a means of safety by others of skill and sound judgment engaged in the same business.”³ “While it is true that the proprietors of stage-coaches do not warrant the safety of passengers in the same sense that they warrant the safe carriage of goods, yet they do warrant that safety so far as to covenant for the exercise of extraordinary diligence and care to insure it; and they do this as common carriers.”⁴ In Connecticut, the highest degree of care which a reasonable man would use is required.⁵ “This rule applies alike to the character of the vehicle, the horses, and harness, to the skill and sobriety of the driver, and to the manner of conducting the stage under every emergency or difficulty. * * * The stage-owner does not warrant the safety of passengers; yet his undertaking and liability as to them go to this extent: that he or his agent shall possess competent skill, and that, as far as human foresight and care can reasonably go, he will transport them safely. He is not liable for injuries happening to passengers from sheer accident or misfortune, where there is no negligence or fault, and where no want of caution, foresight, or judgment would prevent the injury. But he is liable for the smallest negligence in himself or his driver.”⁶

(4.) *Expressions in Steamboat Cases.* — “The carrier of passengers, especially in vehicles and conveyances propelled by steam, where the consequences of an accident from defective machinery are almost certainly fatal to human life, is bound to use every precaution which human skill, care, and foresight can provide, and to exercise similar care and foresight in ascertaining and adopting new improvements to secure additional protection.”⁷ “Carriers of passengers are not insurers of the safety of persons whom they carry; nor do they undertake that the vessels or vehicles which they use, or that the machinery they employ, are absolutely free from defects. They are held to the exercise of the utmost skill and care in the construction and management of both; and when they undertake to carry by the dangerous agency of steam, and injury is occasioned to passengers thereby, they cannot escape liability, unless it appears that the accident happened from causes beyond their control, and to which neither the negligence of the carrier, or of the manufacturer of the machinery, or those employed to manage it, contributed.”⁸

¹ This instruction to the jury was held quite as moderate towards the proprietors of stage-coaches as the authorities would justify. *Frink v. Coe*, 4 G. Greene, 555.

² Charge to the jury in *Farish v. Reigle*, 11 Gratt. 697, 700. Approved by the Supreme Court, *id.* 712, 713.

³ *Id.* 717, per Daniel, J.

⁴ *Fairchild v. Cal. Stage Co.*, 13 Cal. 599.

⁵ *Hall v. Connecticut River Steamboat Co.*, 13 Conn. 319, 326.

⁶ *Derwort v. Loomer*, 21 Conn. 245, 253.

⁷ *Church, C. J.*, in *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, 288.

⁸ *Andrews, J.*, in *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 138. See also *Str. New World v. King*, *ante*, p. 175.

Notes.

§ 5. **Modified Expressions of this Rule in American Cases.**—On the other hand, the carrier is not bound to guard against defects which “nothing short of superhuman prevision could have discovered.”¹ “The utmost care and vigilance is required on the part of the carrier. This rule does not require the utmost degree of care which the human mind is capable of imagining, but it does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger-carriers are bound to use all reasonable precautions against injury of passengers; and these precautions are to be measured by those in known use in the same business which have been proved by experience to be efficacious. The company are bound to use the best precautions in known practical use, * * * but not every possible preventive which the highest scientific skill might suggest.”² “The utmost which human knowledge, human skill, and human foresight and care can provide is all that in reason can be required. To ask more, is to prohibit the running of railways, unless they possess a capital and surplus which will enable them to add a new element to their business,—that of insurance. Nor can we carry the requirement beyond the use of known machinery, and modes of using it. Railroads must keep pace with science and art and modern improvement, in their application to the carriage of passengers, but are not responsible for the unknown as well as the new.”³

In the view of the Supreme Court of Illinois, the rule is not, without qualification, that a railway company employed in transporting passengers must do all that human care and vigilance can do, both in providing safe coaches, machinery, tracks, and roadway, and in keeping the same in repair; but it is that the carrier shall do all that human care, vigilance, and foresight can reasonably do to these ends, consistently with the mode of conveyance and the practicable operation of the road.⁴ Such a rule, it is said, would prevent persons of ordinary prudence from engaging in that character of business.⁵

§ 6. **The modern English Rule of Reasonable Care.**—The modern English rule appears to be that carriers of passengers, even railway companies carrying by the agency of steam, “are only bound to the care and caution which may be reasonably expected to be used by reasonable men.” The measure of their liability is thus brought down to the standard of *ordinary* or *reasonable* care which obtains in other circumstances.⁶ Accordingly we find the rule laid down by the English judges thus: “The contract of the company with the plaintiff was to carry him with reasonable safety.”⁷ The real question is, whether

¹ Crogan v. New York etc. R. Co., 18 Alb. L. J. 70.

² Charge of Thayer, J., in Meier v. Pennsylvania R. Co., 64 Pa. St. 225, approved by the Supreme Court, and said by Agnew, J., to be a correct summary of the law.

³ Agnew, J., *ibid*.

⁴ Pittsburgh etc. R. Co. v. Thompson, 56 Ill. 138; Tuller v. Talbot, 23 Ill. 357.

⁵ Tuller v. Talbot, *supra*. See, however, a more stringent doctrine in an earlier case in the same State, quoted in subsect. 2 of the preceding section.

⁶ Payne v. Great Northern R. Co., 2 Fost. & Fin. 619, 621; Withers v. North Kent R. Co., 27 L. J. (Exch.) 417; Bird v. Great Northern R. Co., 28 L. J. (Exch.) 3. See also Birkett v. Whitehaven etc. R. Co., 4 Hurl. & N. 730; s. c. 28 L. J. (Exch.) 348; Wyborn v. Great Northern R. Co., 1 Fost. & Fin. 162; and especially the late case of Metropolitan R. Co. v. Jackson, 3 App. Cas. 193.

⁷ Brett, J., in Richardson v. Great Eastern R. Co., L. R. 10 C. P. 490.

Rule of "Reasonable Care."

the defendants performed their duty with reasonable diligence.¹ "It was for the plaintiff to prove negligence; the defendants' undertaking was, not to carry safely, but to carry with reasonable care."² Moreover, we find that the English courts have adapted their procedure, in actions for injuries sustained by passengers, to conform to this idea. In all actions founded on negligence, the question whether the defendant has been guilty of a want of ordinary care being, in general, a question for the jury,³ we find they direct the jury to inquire what the duty of the defendant was in the premises. This is well illustrated in the case of *Richardson v. Great Eastern Railway Company*, set out at some length in another section.⁴

§ 7. **American Expressions of this Rule.**—The courts have, for the most part, abandoned the habit of dividing care, and its antithesis, negligence, into *degrees*.⁵ The expression "extraordinary care," in the view of some courts, means no more than that the carrier must use *reasonable* care; that this reasonable care is a relative term, having reference to the duties which the carrier has

¹ Lord Coleridge, C. J., *id.* 491.

² Pollock, C. B., in *Bird v. Great Northern R. Co.*, 28 L. J. (Exch.) 3.

³ 2 Thomp. on Neg., p. 1239.

⁴ It might be worth while to inquire into the change of judicial sentiment, which, beginning with the doctrine that the proprietor of a stage-coach drawn by horses was a warrantor of the soundness and safety of his vehicle, ended by making the proprietor of a railway train propelled by steam, at five or six times the speed of the stage-coach, liable only for a want of what the books term "reasonable care." Certainly if it is right to tell a jury that a stage proprietor is bound to furnish a safe vehicle, it is not right to tell them a railway company is only bound to use reasonable care to the same end. The difference between the old rule and this modern English rule, if it can be said to be an established rule, is vital. The old rule necessarily and logically carried with it the rule that the mere happening of the accident to the carrier's vehicle, or other means of transportation, was *prima facie* sufficient to charge him, and cast upon him the burden of excusing himself. But under the modern rule, we find the judges looking beyond the mere happening of the accident for what is termed "evidence of negligence." Thus, in one case, where the injury occurred from the fracture of a rail, the jury were told by Lord Cockburn, C. J., that if they should be of opinion that the accident was thus caused, and that the use of the rail was negligence on the part of the company, the plaintiff was entitled to their verdict. The question of the burden of proof, however, in this case

was not, it must be confessed, distinctly presented. But in *Withers v. North Kent R. Co.*, 27 L. J. (Exch.) 417 (affirming *s. c.* 1 *Fost. & Fin.* 165), where a railway train went off the track in consequence of the track being washed away by an extraordinary rain, it was said by Bramwell, B., in his opinion, that negligence must be shown by the plaintiff, and that the defendants were bound to know only that which could be known by the exercise of ordinary care and diligence. In the later case of *Great Western R. Co. v. Braid*, 1 Moo. P. C. C. (N. S.) 101 (*s. c.* 9 *Jur.* (N. S.) 339; 11 *Week. Rep.* 444), this doctrine was not followed so far as it related to the burden of proof. But in *Bird v. Great Western R. Co.*, 28 L. J. (Exch.) 3, Pollock, C. B., said that whether the mere happening of the accident was *prima facie* evidence of negligence depended on the nature of the accident. For instance, if the accident arose from the collision of two trains on the same line, then he admitted that it might be so. But where the accident consisted of the train running off the track, he held that the rule was different. Here it was for the plaintiff to prove negligence. The defendants' undertaking was not to carry safely, but to carry with reasonable care. See, however, *Skinner v. London etc. R. Co.*, 5 *Exch.* 786, where Pollock, C. B., followed the rule of Lord Denman, C. J., in *Carpue v. London etc. R. Co.*, 5 Q. B. 751, and held that a collision of railway trains was *prima facie* evidence of negligence. See § 9, *infra*.

⁵ See *Str. New World v. King*, *ante*, p. 175; 2 Thomp. on Neg., p. 844; Whart. on Neg., chap. 1.

Notes.

undertaken and to the risks incident to the business. It means nothing more than this: that the carrier, being intrusted with the most important interests, namely, with human lives, must use a degree of care commensurate with those interests, and have at the same time due regard for the practical exigencies of the business.¹

In a late case in the Supreme Court of Michigan, involving the liability of railway carriers of passengers, CAMPBELL, J., delivering the opinion of the court, says: "If they exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them." The court cite in support of this view several Michigan cases,² and also recent cases in the English courts, holding the same doctrine;³ and the New York cases on the same subject are referred to with disapproval. "They," continues the learned judge, "entirely ignore the true ground of responsibility as depending on the actual negligence of the carrier. There is no such thing as implied negligence, when there is none in fact."⁴

But we must ignore the teachings of nearly all the cases⁵ unless we conclude that a court is warranted, in all actions of this kind, in telling the jury that the carrier is bound to exercise for the safety of his passengers a higher degree of care than that which springs out of ordinary social obligations; that he is bound to exercise the highest degree of care to which human skill and foresight can attain, consistent with the carrying on of the business and with the known methods and the present state of the particular art.⁶

¹ Sawyer v. Hannibal etc. R. Co., 37 Mo. 240, 260; Le Barron v. East Boston Ferry Co., 11 Allen, 312.

² Michigan etc. R. Co. v. Coleman, 28 Mich. 440; Grand Rapids etc. R. Co. v. Jadson, 34 Mich. 506; Fort Wayne etc. R. Co. v. Gildersleeve, 33 Mich. 133; Michigan etc. R. Co. v. Dolan, 32 Mich. 510.

³ Richardson v. Great Eastern R. Co., 1 C. P. Div. 342; Daniel v. Metropolitan R. Co., L. R. 5 H. L. 45; Readhead v. Midland R. Co., ante, p. 121.

⁴ Grand Rapids etc. R. Co. v. Huntley, 38 Mich. 537, 546, 548.

⁵ *Supra*, § 4.

⁶ Oliver v. New York etc. R. Co., 1 Edm. Sel. Cas. 589; Kansas Pacific R. Co. v. Miller, 2 Col. 442; Sullivan v. Phila. etc. R. Co., 30 Pa. St. 234; Wilkie v. Bolster, 3 E. D. Smith, 327; Houston etc. R. Co. v. Gorbett, 49 Texas, 573; Caldwell v. Murphy, 1 Duer, 211. This doctrine was thus admirably expressed by Erle, C. J., in charging a jury: "Negligence is not to be *defined*, because it involves some inquiry as to the *degree* of care required, and that is the degree which the jury think is *reasonably* to be required from the parties, considering all the circumstances. The railway company is bound to take *reasonable* care; to use the *best* precau-

tions in known practical use for securing the safety and convenience of their passengers. If they have done so, they have done their duty and are not guilty of negligence; if they have failed in their duty, and their negligence has caused the injury, then they are liable in the action. You are to consider what is reasonable care, and whether they have used the proper precautions. They are intrusted with most important interests, — with human lives, — and a jury may reasonably require an amount of care proportioned to those interests. At the same time, a jury would not be entitled to expect the *utmost* care that could possibly be conceived, or the highest possible degree of skill. It is to be borne in mind that railways themselves are of recent introduction, and that their management is a matter of experience and of practical knowledge which increases day by day. It is not to be expected that the directors shall at once have in use every invention or discovery of science. It is sufficient if they use every precaution in *known practical use*, for the *safety and convenience* of the passengers. Both objects must be looked to. It is easy to conceive a precaution — for example, a slower rate of speed — which would add a very small degree of security, while it would entail a very great degree of incon-

Presumption from Fact of Accident.

It is not a denial, but a just application, of this principle, that the degree of care required in a carrier of passengers by stage-coaches, in the preparation and management of the means of conveyance, is not a test of that which is required of those engaged in transporting persons at a high rate of speed by means of steam-power upon a railway.¹

§ 8. **Limitations upon the Rule of Extraordinary Care.**—The rule imposing upon the carrier of passengers the highest degree of care has this limitation: it applies only to those means and measures of safety which the passenger of necessity must trust wholly to the carrier. It is, in general, applicable only to the period during which the carrier is in a certain sense the bailee of the person of the passenger. We have seen in the previous chapter that where the passenger is injured by reason of certain defects in the buildings or grounds of the carrier before the transit has commenced or after it has ended, the carrier is or is not liable, accordingly as he has or has not been guilty of a want of *ordinary care*. In this respect he occupies toward the passenger the precise relation of any other owner of real property towards his customers who come upon his premises by his invitation, expressed or implied, to do business with him. So, as to those buildings, platforms, grounds, etc., supplied by the carrier for the use of the passenger, where the latter is not merely passive,—as, the means of entrance to or of exit from his vehicle,—if the passenger is injured on account of any visible defects, under such circumstances that his own want of care may be supposed to mingle to some extent as an ingredient in the accident, the carrier will not, it seems, be held liable for not having, in the construction or repair of the particular instrumentality, exercised extraordinary care. Thus, a passenger, in making his exit from a steamboat, slips upon the smooth and slippery surface of a plate of brass with which the steps are covered, falls, and is injured. The particular stairs are finished in the same manner as the best river-boats and American sea-going steamers. The carrier is not liable for this injury, and it is error to refuse a nonsuit.² The flap of a ferry-boat is not made after the latest and most approved pattern, and does not present an even surface for teams to drive over in making their exit from the boat. A man with his horses and sled attempts to drive off the boat. His sled strikes the edge of the flap, and is brought up with a sudden jerk, which precipitates his load forward upon him and injures him. The ferry company is not liable simply because it did not adopt the latest improvement in the means of exit of vehicles from its boat.³

§ 9. **Presumption of Negligence from the happening of the Accident.**—Although it is never strictly true, in relations not springing out of contract, that a presumption of negligence arises from the mere fact that an accident has happened, without more,—that is, the mere fact that A. has been accidentally

venience. And a company ought not to be found guilty merely because they possibly might have done something more for safety, at a far greater sacrifice of convenience." *Ford v. London etc. R. Co.*, 2 *Fost. & Fin.* 730, 732.

¹ *Hegeman v. Western R. Corp.*, 13 *N.*

Y. 9 (affirming *s. c.* 16 *Barb.* 353), *ante*, p. 160.

² *Crocheron v. North Shore Staten Island Ferry Co.*, 56 *N. Y.* 656 (reversing *s. c.* 1 *Thomp. & C.* 446).

³ *Le Barron v. East Boston Ferry Co.*, 11 *Allen*, 312.

Notes.

injured will not raise a presumption that B. has injured him, — yet, where A. has for a consideration undertaken a certain duty to B., and has failed in the performance of it, it is obvious that B. makes out a case for damages against A. by proving that A. has undertaken that duty and failed in its performance, without more. Of course, this supposes that B.'s evidence simply discloses facts sufficient to show the undertaking of such duty of A., and A.'s failure to perform it. It may be that in attempting to make this appear, B. will be obliged to give evidence of circumstances which, while showing the undertaking of the duty, and the failure, carry along with them evidence of a legal excuse on the part of A. for not discharging the duty which he had undertaken. Thus, a railway company undertakes to transport B. from the city of C. to the city of D. A bridge upon the company's road has been burnt down, and, notwithstanding due inspection of its road by the company, this fact is not discovered until the train on which B. is plunged into the chasm and B. is killed. Under a statute providing for the survival of actions in cases where the injury results in death, B.'s widow brings an action against the railway company. Now, it is supposed that if her evidence shows that the company contracted, for a consideration, to carry B. as stated, and that owing to the burning of one of the company's bridges an accident happened in which B. was killed, she makes out a case against the company. But suppose that the evidence that she is obliged to introduce touching the facts of the accident shows that the bridge was burned down by a hostile force at war with the constituted authorities of the government. Here, it is supposed, the evidence taken together would not raise a presumption of negligence on the part of the company, and would not be sufficient to make out her case, unless she should also show that, notwithstanding the bridge was burnt by the public enemy, if it had been properly watched, the men in charge of the train would have been apprised of the accident in time to have avoided the consequence from it which happened.¹ Again, the evidential facts introduced by the plaintiff may be such as to present at the same time evidence of negligence on the part of the defendant and of contributory negligence on his own part. For, although the carrier is under a high degree of care to carry the passenger in safety, this does not absolve the passenger from the duty of taking ordinary care to avoid being injured. If the evidence for the plaintiff is of such a character as to present at the same time these two questions alone, then the question as to the burden of proof does not arise at all; it will be for the court to consider whether the facts in proof amount to what the books term *evidence of negligence* in the carrier, and also whether they amount to evidence of negligence in the passenger.²

In conformity with these views and with the weight of authority, we may state the general rule to be, that where an injury happens to the passenger in consequence of the breaking or failure of the vehicle, roadway, or other appliances owned or controlled by the carrier, and used by him in making the transit, the person entitled to sue for an injury makes out a *prima facie* case for damages against the carrier by showing the contract of carriage, that the accident happened in consequence of such breaking or failure, and that in consequence of

¹ *Sawyer v. Hannibal etc. R. Co.*, 37 Mo. 240, 260.

² A good illustration of this is the case of *Gee v. Metropolitan R. Co.*, L. R. 8 Q. B. 161;

s. c. 42 L. J. (Q. B.) 105; 21 Week. Rep. 584; 28 L. T. (N. S.) 282. See also *Laing v. Colder*, 8 Pa. St. 479.

Presumption from Fact of Accident.

this accident he sustained damage. When these facts are made to appear, it will devolve upon the carrier to excuse this *prima facie* failure of duty; to show that notwithstanding the accident happened, as shown by the plaintiff's evidence, it happened in spite of the use by himself, his servants, and the contractors by whom his roadway, appliances, and vehicles were built, of the greatest degree of diligence practicable under the circumstances. In other words, he must show, in order to rebut this presumption, that the accident resulted from circumstances against which human care and foresight could not guard.¹ If he makes it appear that he, and the agents and contractors whom he has employed, have discharged the very high measure of care and skill which, as already seen, the law puts upon him, he will be entitled to a verdict of acquittal. This rule may possibly be made clearer by stating it in a different way. It means that while the burden is on the plaintiff generally to maintain the affirmative of the issue, yet he discharges this burden by showing that the accident happened through the failure of some of the means adopted and used by the carrier in attempting to make the transit. He is not required to go further, and show affirmatively that the high degree of care, skill, and foresight which the law puts upon carriers would have avoided the accident.² The law, looking both to the convenience and justice of the case,—convenience, because the evidence is generally in the possession of the defendant and not in that of the plaintiff; and justice, because the plaintiff should not be required to give evidence as to facts which are known to the defendant and not to him, and which the defendant is interested in withholding from him,—requires the defendant to prove affirmatively that such care and skill were exercised.

To state cases in illustration of this rule: A passenger is injured in consequence of a stage breaking down,³ or overturning;⁴ or of a horse hitched to an omnibus kicking through a front panel of the vehicle;⁵ or of the horses starting up while the passenger is alighting;⁶ or of an embankment of the railway giving way;⁷ or by the train running off the track,⁸ or colliding with

¹ *Bowen v. New York etc. R. Co.*, 18 N. Y. 403; *Christie v. Griggs*, *ante*, p. 181; *Baltimore etc. R. Co. v. Wightman*, 29 Gratt. 431, 444; *Great Western R. Co. v. Braid*, 1 Moo. P. C. C. 101; *s. c.* 9 Jur. (N. S.) 339; 11 Week. Rep. 444; *Carpue v. London etc. R. Co.*, 5 Q. B. 749, per Lord Denman, C. J., at *nisi prius*; *Skinner v. London etc. R. Co.*, 5 Exch. 786; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225; *Laing v. Colder*, 8 Pa. St. 479, 483, per Bell, J.; *Sullivan v. Phila. etc. R. Co.*, 30 Pa. St. 234, 239; *Farish v. Reigle*, 11 Gratt. 697; *Wilkie v. Bolster*, 3 E. D. Smith, 327; *Stokes v. Saltonstall*, *ante*, p. 183; *Railroad Co. v. Pollard*, 22 Wall. 341; *Holbrook v. Utica etc. R. Co.*, 16 Barb. 113 (affirmed 12 N. Y. 236); *Toledo etc. R. Co. v. Beggs*, 85 Ill. 80; *Pittsburgh etc. R. Co. v. Thompson*, 56 Ill. 138; *McKinney v. Neil*, 1 McLean, 540; *Stockton v. Frey*, 4 Gill, 406; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Ware v. Gay*, 11 Pick. 106; *Younge v. Kinney*, 28 Ga. 111; *Brehm v. Great Western R. Co.*, 34 Barb. 256; *Curtis v. Rochester etc. R. Co.*, 18 N. Y. 534, *ante*, p. 184; *Galena etc. R. Co.*

v. Yarwood, 15 Ill. 468; *s. c.* 17 Ill. 509; *McLean v. Burbank*, 11 Minn. 277; *Sawyer v. Hannibal etc. R. Co.*, 37 Mo. 240, 260.

² *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

³ *Christie v. Griggs*, *ante*, p. 181; *Ware v. Gay*, 11 Pick. 106.

⁴ *Farish v. Reigle*, 11 Gratt. 697; *Stokes v. Saltonstall*, *ante*, p. 183; *McKinney v. Neil*, 1 McLean, 540; *Stockton v. Frey*, 4 Gill. 406; *Fairchild v. California Stage Co.*, 13 Cal. 599.

⁵ *Simson v. London etc. Omnibus Co.*, L. R. 8 C. P. 390; *s. c.* 42 L. J. (C. P.) 112; 21 Week. Rep. 595; 28 L. T. (N. S.) 550.

⁶ *Roberts v. Johnson*, 58 N. Y. 613 (affirming *s. c.* 5 Jones & Sp. 157).

⁷ *Great Western R. Co. v. Braid*, 1 Moo. P. C. C. (N. S.) 101; *s. c.* 9 Jur. (N. S.) 339; 11 Week. Rep. 444; *Brehm v. Great Western R. Co.*, 34 Barb. 256. *Contra*, *Withers v. North Kent R. Co.*, 27 L. J. (Exch.) 417; *s. c.* at *nisi prius*, *sub nom* *Kent v. Great Northern R. Co.*, 1 Post. & Fin. 165.

⁸ *Carpue v. London etc. R. Co.*, 5 Q. B. 749,

Notes.

with another train,¹ or with an object projecting from a car of a train of a carrier coming from an opposite direction upon another track of the defendant,² or breaking down;³ or where the boiler of a steam vessel explodes;⁴ or where some unknown substance strikes the car, injuring the passenger;⁵ or where a female passenger, standing up in a Pullman car, receives a fall in consequence of other cars being shunted against this car in switching.⁶ In all these cases, the mere fact that the accident happened under the circumstances named was held to create a presumption of negligence against the carrier, which he must overcome by evidence on his part, or suffer a judgment for damages. So, where the accident was shown to have happened from the explosion of a lamp in an omnibus, it was held that the burden lay on the defendant to show that the burning-fluid, or other material, used in the lamp was a safe and proper article.⁷ So, where the plaintiff proves that the defendant's coach in which he was riding was driven at a moderate rate of speed upon a plain and good level road, and that, coming in contact with another object, one of the wheels came off and the coach overturned, whereby the plaintiff was hurt, the law would imply negligence from these facts; for it would be a reasonable conclusion from them that the stage-coach was not properly fitted and provided. Then the burden of proof would change, and it would be for the defendant to rebut this legal inference.⁸

The foregoing rule refers to the legal value of certain evidential facts, and, like many other legal rules, it is in danger of being misapplied unless its boundaries are carefully ascertained. We doubt if these boundaries have been better summarized than by Messrs. Shearman and Redfield in their excellent work on Negligence, where they say there must be "*prima facie* proof that the proximate cause of such injuries was a want of something which, as a general rule, the carrier was *bound to supply*, or the presence of something which, as a general rule, the carrier was bound to *keep out of the way*."⁹

It is believed that three exceptions to it may be stated:—

1. It does not apply where the defect, deficiency, or peculiarity in the carrier's means of transportation or accommodation, which was the occasion of the accident, was visible, seen by, and known to the passenger as well as to the carrier. This may be well illustrated by a case in Massachusetts, already quoted in other connections. There, the flap of a ferry-boat was not of the most convenient pattern; it did not unite with the surface of the dock on a level, but made a jog. A passenger attempted to drive off with his horses and sled. His sled struck the jog, and stopped with a sudden jerk which threw the load

per Lord Denman, C. J., at *nisi prius*; Sullivan v. Phila. etc. R. Co., 30 Pa. St. 234; Pittsburgh etc. R. Co. v. Thompson, 56 Ill. 138; s. c. 4 Ch. Leg. N. 9; Yonge v. Kinney, 23 Ga. 111; Edgerton v. New York etc. R. Co., 35 Barb. 389; Zemp v. Railroad Co., 9 Rich. L. 84; Dawson v. Manchester etc. R. Co., 7 Hurl. & N. 1037. *Contra*, Bird v. Great Northern R. Co., 23 L. J. (Exch.) 3.

¹ Skinner v. London etc. R. Co., 5 Exch. 786; s. c. 2 Eng. Law & Eq. 360; 15 Jur. 299; New Orleans etc. R. Co. v. Allbritton, 38 Miss. 242, 274.

² Walker v. Erie R. Co., 63 Barb. 260.

³ Meier v. Pennsylvania R. Co., 64 Pa. St. 225; Toledo etc. R. Co. v. Beggs, 85 Ill. 80.

⁴ Caldwell v. New Jersey Steamboat Co., 47 Y. Y. 282, 293.

⁵ Holbrook v. Utica etc. R. Co., 16 Barb. 113 (affirmed 12 N. Y. 236).

⁶ Railroad Co. v. Pollard, 22 Wall. 341.

⁷ Wilkie v. Bolster, 3 E. D. Smith, 327.

⁸ Ware v. Gay, 11 Pick. 106.

⁹ Shear. & Redf. on Neg., §280. This statement of doctrine was cited with approval in Railroad Co. v. Mitchell, 11 Heisk. 400, 403. See also Miller v. St. Louis R. Co., 5 Mo. App. 471.

Presumption from Fact of Accident.

forward upon him and injured him. Here it was held that the mere fact that the accident happened under the circumstances stated did not make out a case against the ferry company; and the reasons for this conclusion are well set forth in the opinion of the court by COLT, J.:¹ "The plaintiff further asked the court to rule that, having proved due care on his part, and the occurrence of the accident, the law would imply negligence on the part of the defendants, and cast upon them the burden of proving that the accident happened without their fault. We think such instruction would have been erroneous, as applied to the case presented upon the pleadings and evidence. The declaration alleges that the negligence of the defendants consisted in not providing safe exit for the plaintiff with his loaded wagon from their ferry-boat, so that in attempting to pass off the boat the wheels of the wagon struck violently against the drop of the ferry and threw the load upon the plaintiff, causing the injury complained of.

"The general rule that the plaintiff, in actions of this description, is bound to prove negligence on the part of the defendants as the cause of the injury, has been apparently modified in a class of cases in which it is said that proof of due care on the part of the plaintiff, with proof of the accident, is *primâ facie* evidence of negligence on the part of the defendants. An examination of these cases, we think, will show that there is in them no real invasion of the general rule as to the burden of proof. It will be found, we believe, in all of them, that the nature of the accident was such, or the attending circumstances such, that proof of the accident alone raised a presumption of negligence, and that the same evidence which proved the injury done also proved the defendants' negligence, or developed circumstances from which it must be presumed. Thus, in *Carpue v. London and Brighton Railway*,² where the injury was caused by a train running off the track and overturning the carriage in which the plaintiff was a passenger, DENMAN, C. J., told the jury that, 'it having been shown that the exclusive management of the machinery and the railway was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause.' So in *Stokes v. Saltonstall*,³ the injury was occasioned by the overturning of a stage-coach; and in *Ware v. Gay*⁴ the accident was of a similar nature, occasioned by the running off of the wheel of the coach in which the plaintiff was a passenger. In these cases clearly the nature of the accident afforded proof of the defendants' negligence.

"The plaintiff, in proving his injury, must ordinarily prove the nature of the accident and the circumstances; and when such proof has any tendency to prove negligence, and especially when the defendant has exclusively the means of knowledge within his control as to what caused the injury, it is said the burden is cast upon the defendant to explain the cause and exculpate himself.

"Upon recurring to the facts in this case, it appears that this accident might have happened without negligence on the part of the defendants, and that the means of knowledge as to the cause of the injury were equally within the reach

¹ *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312, 316.

² 5 Q. B. 747.

³ 13 Pet. 181. ⁴ 11 Pick. 106.

Notes.

of both parties. The court therefore rightly declined to give the instructions asked for upon this point, and for the reasons stated; the instructions which were given were sufficiently favorable to the plaintiff."

2. It does not apply where the occasion of the hurt of the passenger was an active voluntary movement on his part, combined with some alleged deficiency in the carrier's means of transportation or accommodation; and the reason is that in such cases it is necessary to consider whether there may not have been contributory negligence on the part of a passenger. It is only in respect of those accidents which happen to the passenger while he passively trusts himself to the safety of the carrier's means of transportation, or to the skill, diligence, and care of his servants, that the rule applies. To illustrate this, let us consider two cases side by side. A passenger is seated in a railway coach, and the train being in motion, the coach comes in contact with some unknown substance, injuring the passenger. The happening of such an accident is *prima facie* evidence of negligence on the part of the carrier.¹ But where an accident happened to the passenger in consequence of his having thrust his arm out of the window, so that it came in contact with some substance which the train was passing, this would not be so.² And the same rule was declared where the passenger fell in leaving the car, and passed under the wheels and was killed;³ and where the passenger, in consequence of a voluntary movement made by him, had his hand caught in a door and injured.⁴

3. It does not apply where the plaintiff's evidence shows that the accident was caused by something so wholly disconnected with the operation of the carrier's business as not to involve the safety or sufficiency of his instrumentalities, or the negligence of his servants. This was conceded by the court in the case of the *Kansas Pacific Railway Company v. Miller*,⁵ and is intelligently stated and explained by SELDEN, J., in *Curtis v. Rochester and Syracuse Railroad Company*.⁶ The obvious correctness of this rule may be seen from one or two illustrations of it: While a railway train is in motion, a passenger is struck by a gunshot fired from without; a malicious person suddenly places an obstruction upon a railway track in front of the train, or misplaces a switch in the night,⁷ whereby it is thrown from the track and a passenger injured; a ship is fired upon by a piratical craft and sunk, and a passenger drowned; a railway passenger-train, proceeding with due care upon a level and safe track, is overthrown by the violence of a tornado.⁸ It is only necessary to suggest these cases to enforce the conclusion that in the absence of *other evidence*, showing negligence on the part of the carrier, no presumption would be raised which would shift the burden of proof upon him. And the reason is that the so-called presumption of negligence arising from the mere happening of the accident is not a presumption of law, but a presumption of fact, and it is not the less a presumption of fact because it is drawn by the judge from the facts in proof, and not by the jury. It is a conclusion to be drawn from the existence of certain evidential facts, and this conclusion will be

¹ *Holbrook v. Utica etc. R. Co.*, 16 Barb. 113 (affirmed 12 N. Y. 236).

² See the next chapter.

³ *Railroad Co. v. Mitchell*, 11 Heisk. 400.

⁴ *Metropolitan R. Co. v. Jackson*, 3 App. Cas. 193.

⁵ 2 Col. 442, 458.

⁶ *Ante*, p. 188. See also *Deyo v. New York etc. R. Co.*, 34 N. Y. 9.

⁷ *Latch v. Rumuer R. Co.*, 27 L. J. (Exch.) 155.

⁸ *McClary v. Sioux City etc. R. Co.*, 3 Neb. 44.

Latest Improvements — Latent Defects.

drawn accordingly as the facts are or are not sufficient to warrant it. And when the question arises whether the conclusion is to be drawn or not, it is solved by precisely the same principle which solves the question under what circumstances negligence is a question for the judge, and under what a question for the jury.¹ In those cases, if the facts in evidence are such that no reasonable man could draw from them a conclusion that the defendant had been negligent, the judge nonsuits the plaintiff.

II. IN FAILING TO PROVIDE A SAFE VEHICLE AND ROADWAY.

§ 10. Duty to adopt Latest Improvements.—It is obvious that so high a degree of care as that which the law exacts of the carrier of passengers is not discharged unless the carrier adopts, so far as is practicable, the latest improvements in his means of transportation which have been found by experience well adapted to increase the safety of his passengers. If this is true generally, it is especially true when he undertakes to carry passengers by the dangerous agency of steam. There is, however, a limit to this obligation. "Railroads must keep pace with science and art and modern improvements, in their application to the carriage of passengers, but are not responsible for the unknown as well as the new."² It is obviously impossible to state any rule as to where the limit of this duty lies; and for this reason it must, in general, be a question of fact for the jury.³ A less stringent rule has been adopted in Massachusetts. There, the rule has been laid down that a carrier is not bound to adopt a new and improved method because safer or better than the methods already employed by him, if it is not requisite to the *reasonable* safety or convenience of his passengers, and if the expense is excessive; the cost of such improved method may be a sufficient reason for refusing to adopt it.⁴

§ 11. Accidents from Latent Defects in Vehicles.—If a carrier, in the construction of a machine, in the purchase of it where it is constructed by another, in the inspection of it at the time of its purchase and from time to time during its use by him, and finally in the use of it, uses that exhaustive care which is reasonably incumbent upon him, considering the nature of his business and the risks which it involves to his passengers, and, notwithstanding such care, his vehicle breaks down and his passengers are injured or killed, he will not be liable to pay damages to them or their personal representatives.⁵ It has been held that a carrier will be liable if the defect in the vehicle which caused the accident

¹ 2 Thomp. on Neg., p. 1235.

² Agnew, J., in *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, 230.

³ It was so held in *Hegeman v. Western R. Corp.*, *ante*, p. 160.

⁴ *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312. Compare also the observations of Bellows, J., in *Taylor v. Railway*, 43 N. H. 316, *supra*, § 4, subsect. 2.

⁵ *Stokes v. Eastern Counties R. Co.*, 2 Fost. & Fin. 691. To the same effect is *Peoria etc.*

R. Co. v. Thompson, 56 Ill. 138. On the same principle, a *livery-stable* keeper who lets carriages for hire is answerable to the hirer for injuries which may happen by reason of defects in the carriage which might have been discovered by the most careful and thorough examination, but not for an injury which happens in consequence of a hidden defect, which could not upon such examination have been discovered. *Hadley v. Cross*, 34 Vt. 586.

Notes.

could have been discovered by any test known to a man skilled in the business of manufacturing such vehicles.¹ It is not material that any or all skilful manufacturers had, up to the time of the accident in question, omitted certain known tests, the use of which would have prevented the accident;² which is equivalent to saying that ordinary care—that is, the care employed by a good and careful man engaged in a like business—will not discharge the carrier.

Where the axletree of a coach broke on a cold day, in consequence of which a passenger was injured, and the defence was that the breaking happened in consequence of frost, the trial court declined to give the following instructions at the request of the defendants: (1.) "If the jury believe from the evidence that the cause of the accident which occasioned the plaintiff's injury was the breaking of the axletree of the defendants' coach from frost, and not from any defect in the axletree, then they should find for the defendants. (2.) If the jury believe from the evidence that the cause of the accident which occasioned the plaintiff's injury was the breaking of the axletree of the coach from frost, and not from any defect in the coach or in the axletree, then, whether the coach was old and defective or not, they should find for the defendants. (3.) If the jury believe from the evidence that it is equally as probable that the axletree broke from the effect of the frost as from any defect in the coach or in the axletree, then the jury should find for the defendants." But the court, on the part of the plaintiff, instructed the jury as follows: "If the coach might have been constructed in a manner that would have obviated all danger from frost, and still have been suitable for the business of carrying passengers, or if the defendants, by housing or taking the utmost care of their coach when it was not running, could have prevented the action of the frost, then, even if the axletree did break from frost, that would not constitute a defence." These rulings were held error, the Supreme Court saying: "The instruction given by the court for the plaintiff was doubtless intended as a qualification of instructions given for the defendants; but, in any light, was calculated to mislead the jury, and, if held to be the law, would extend the liability of common carriers of passengers to a most unreasonable point. Common carriers of passengers are not insurers against all injury or damage. Although the law requires the highest degree of care on the part of the defendants, and holds them liable for slight negligence, it does not require of them unreasonable or impracticable vigilance. The language of the law must be viewed in a practicable and common-sense light, and so applied in the administration of justice. What is reasonable and practicable under one condition of things, may not be under another. What in one case would be accessible, and facilitate the convenience and safety of travel, in another and under different circumstances might be inaccessible, and destructive of the particular enterprise. The axle *might* have been constructed of wood, or other material than iron, and have been, perhaps, suitable to the business, which frost would not affect; and yet, upon the whole, not have been as safe, or fit for the particular use. The housing of the coach might, from the condition of the country, have been impracticable. If the same acts of care and precaution practicable in the most populous countries and under the most favorable circum-

¹ *Hegeman v. Western R. Corp.*, *ante*, p. 170.

² *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282

 Latent Defects.

stances were required to fill the measure of the law under a condition of things entirely different, existing in a new country, the effect would be to discourage enterprises of the character in question, and to lessen the facilities for public travel of the people of the newer portions of our country. The law is not designed to work such a result. The true question for inquiry was: Would a person of extraordinary prudence and caution, intending to afford the greatest security to passengers and at the same time afford reasonable facilities to travel, under all the circumstances have acted differently? It is impossible by the use of language to define negligence *in fact*, applicable alike to all circumstances and conditions of things; and all that can be done in determining, in any given case, whether there is or is not negligence, is, in view of all the surrounding facts, the nature of the means employed, and the character of the enterprise, by the exercise of the reason to form a judgment as to whether it does or does not exist."¹

It is too obvious for comment that where the accident has happened from the breaking of some appliance of the carrier, it will be no defence for him to show that the particular appliance which broke was a sound one, of a good kind, and that it was like the other appliances which he had adopted. He is bound to exercise the same degree of care in adopting suitable instrumentalities as in seeing that each particular one is free from defects. Thus, it is no defence to such an action, for a stage-coach proprietor to show that the harness which broke was a sound harness of the style which he used on his line.²

But if the appliances are amply sufficient for all the ordinary purposes of travel, the carrier will not be responsible for every possible accident occurring, although their construction might have been improved so as to have averted the mishap. Thus, the forward deck of a steamboat was surrounded by bulwarks three or four feet high, with gangways upon each side, closed by rails hinged to the bulwarks and of the same height, and coming down upon stanchions in the centre of the gangway, leaving the space beneath open. This deck was not designed for passengers, but they were permitted to come upon it with the knowledge of the defendant's employees. The plaintiff's intestate, a passenger on the boat, came out thereon. His hat blew off, and in springing to recover it, he slipped under the gangway rail, fell overboard, and was drowned. It appeared that all the boats upon the lake were constructed in the same manner; that they had been so run for many years, and there was no proof tending to show that any one had ever before gone overboard in this way, or that such danger had been apprehended. It was held that the evidence failed to show negligence on the part of the defendant, and the plaintiff was properly nonsuited.³

The English doctrine, elsewhere alluded⁴ to, that the measure of duty of a carrier of passengers is *reasonable* care, is illustrated by the case of *Richardson v. Great Eastern Railway Company*,⁵ where it appeared that in the course of a journey from P. (a junction on the defendants' line) to London, a truck which had been received from another road, laden with coal, broke down in consequence of the fracture of an axle, and caused a collision of the freight-train with a

¹ Citing *Frink v. Potter*, 17 Ill. 406, 412; *Beers v. Housatonic R. Co.*, 19 Conn. 566.

² *Farish v. Reigle*, 11 Gratt. 697, 716.

³ *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1.

⁴ *Supra*, § 6.

⁵ L. R. 10 C. P. 486.

Notes.

passenger-train in which the plaintiff was riding as a passenger, whereby the plaintiff was injured. The truck which broke down belonged to another company, whose duty it was to keep it in repair. The course of business at the junction was that every truck, before coming on to the defendants' line, underwent some kind of an examination as to its fitness for travel. This particular truck, when submitted to such examination, was found to have a defective spring, and a serious crack in one of its main timbers, and it was accordingly taken upon a siding and detained there four or five days for the purpose of having a new spring put on. This was done by the company owning the truck. The truck (which had not been unloaded) was then sent on, with a direction chalked on it by a servant of the company owning it that it should "stop at Peterborough for repairs when empty." Upon a minute examination of the truck after the accident, it was found that the fore-axle, which was three and a half inches thick, had across it, near the wheel, an old crack an inch and a quarter deep, which was admitted to have been the sole cause of the breakdown. There was conflicting evidence as to whether or not, regard being had to the extent of the traffic at the junction, it was possible to have discovered this defect in the axle by any practicable examination at the junction, and the following questions were submitted to the jury: 1. Would the defect in the axle which was the cause of the accident have been discovered or discoverable upon any fit and careful examination of it to which it might have been subjected? 2. Was it the duty of the defendants to examine this axle by scraping off the dirt and looking minutely at it, — so minutely as to enable them to see the crack and so to prevent or remedy the mischief? 3. If that was not their duty upon the first view of the truck, did it become their duty so to do when, upon having discovered the defects, [*i.e.*, the spring, and the crack in the main timber] they ordered it to be repaired, and it remained four or five days on their premises for the purpose? The jury answered the first question in the affirmative and the second in the negative; and to the third question they answered, "It was their duty to require from the wagon company [the company owning the truck] some distinct assurance that it had been thoroughly examined and repaired." The learned judge thought the last answer immaterial, and directed a verdict for the defendants, reserving leave to the plaintiff to move to enter a verdict for him for an agreed sum if upon the facts and findings of the jury the court should be of opinion that the defendants were guilty of negligence. Upon these findings the plaintiff was held to be entitled to a verdict; for although it might not have been the duty of the defendants themselves to cause the truck to be properly examined and repaired upon its arrival at the junction, nevertheless it was somebody's duty to do it, and the defendants were guilty of culpable negligence in not satisfying themselves that a proper examination had taken place before they allowed the truck to proceed.¹

§ 12. Defects in the Carrier's Roadway. — It is well laid down that a railroad company, being the owner of its road as well as of its carriages, is bound to the same degree of diligence and skill as to the condition and construction of its road as it is with reference to the condition and construction of its carriages.

¹ Richardson v. Great Eastern R. Co., L. R. 10 C. P. 486.

Defects in Roadway.

When, therefore, the road was built on an embankment, and the company had taken no precautions by widening the ground of the road, or by erecting walls, to prevent trains which might run off the track from going over the embankment, and such an accident happened, whereby a traveller was injured, it was held a case for damages.¹

So, if the gate or crossbar maintained at a railway-crossing is so constructed that, in any event which may reasonably be expected to occur, it is dangerous to passengers, the railway company will be liable to a passenger for any injury sustained by reason thereof. Thus, it appeared that at the intersection of a railway track and the highway the railway company had placed a gate consisting of a pole about thirty-five feet long, which, when trains were passing, was swung from one side of the highway to a post on the other, as a bar to travellers on the highway. On such an occasion, a heavy runaway team came along the highway, dashed against the pole while in such position, and broke or loosened it from its fastening. The pole swung obliquely across the railroad track, and the whole or a part of it was driven into a car of the passing train, which had not slackened its speed. In an action by a passenger in this car for injuries received in this accident, evidence of the above facts was held sufficient to warrant a jury in finding that the accident was caused by the defendants' negligence.²

But the carrier will not be liable to pay damages if such injuries happen through latent defects in his roadway, bridges, or other permanent structures, where he has bestowed the highest measure of care upon the construction, the inspection, and the reparation of them.³ In a case where a passenger was killed by the giving way of a railway embankment after an unusual storm, the judicial committee and lords of the Privy Council, after animadverting upon the impracticability of laying down any rule upon the subject, thought that the railway company ought to have constructed their works in such a manner as to be capable of resisting all the violence which, in the climate of Canada, where the accident took place, might have been expected, though perhaps rarely, to occur. In other words, their conclusion was that a railway company is bound to construct their roadway so that it will resist those extraordinary floods which sometimes, though not often, occur.⁴ In this case reference is made to the difficulty of reconciling the case of *Withers v. North Kent Railway Company*,⁵ which is cited as an illustration of this. Though this latter case contains some expressions which are not law, the correct result was no doubt reached. A railway embankment, consisting of sandy soil, after having stood for five years over a marshy ground, was washed away by an extraordinary storm of rain, and a night train ran off the track, and the plaintiff, a passenger, was injured. A verdict was returned for the plaintiff; the judgment upon which was set aside by the court *in banc*, on the ground that there was no evidence of negligence. BRAMWELL, B., declared that "negligence must be shown by the plaintiff," and that the defendants were bound to know only that which could be known by the exercise of ordinary care and prudence; otherwise they would be insurers

¹ *Hanley v. Harlem R. Co.*, Edm. Sel. Cas. 359. See also *supra*, § 4, subsect. 2.

² *Tyrrell v. Eastern R. Co.*, 111 Mass. 546.

³ *Hanley v. Harlem R. Co.*, Edm. Sel. Cas. 359.

⁴ *Great Western R. Co. v. Braid*, 1 Moo. P. C. C. (N. S.) 101; s. c. 9 Jur. (N. S.) 339; 11 Week Rep. 444; 8 L. T. (N. S.) 31.

⁵ 3 Hurl. & N. 969; s. c. 27 L. J. (Exch.) 417; at *nisi prius*, 1 Fost. & Fin. 165.

Notes.

of the safety of the passengers. All the judges thought that the existence of the line for five years, notwithstanding the country was subject to floods, was evidence that there was no negligence. The observation of Baron BRAMWELL that it was for the plaintiff to show negligence, ignores the rule which obtains in nearly all the courts that the fact that the accident happens through a defect in some appliance of the carrier is, unexplained, evidence of negligence.¹

If there were no rule exacting an extraordinary degree of diligence of carriers of passengers, still it would not be error for a judge to refuse to tell a jury that if the injury was produced in part by an unforeseen cause, and in part by a cause attributable to negligence, the plaintiff could not recover.² It has been held no error to refuse to charge that the plaintiff could not recover unless there was some *apparent* source of danger to the embankment which gave way.³ They are even answerable for the negligence of another railroad company over whose road they run their cars,—as, where a train is thrown from the track by a switch belonging to another company.⁴

The fact has been developed by testimony in at least one case that good and perfectly sound rails will break in cold weather when the track is in perfect order; and, so far as is known, there is no way of preventing such accidents, except, possibly, to increase the size of the rails to dimensions greater than that in common use.⁵ Suppose such an accident has happened, and it appears from undisputed evidence that the rail which broke was, previous to the accident, a sound rail, of the usual and a good size, and made of good, sound, and solid iron; that the brakes were perfectly new and bright; that no fracture or crack was discovered in the pieces broken off; that the end of the rail made a good joint, was perfect, not battered down, and in good order; that the chair was good; that the ties were likewise good, and sufficiently thick to support the rail; that there was a sufficient number of them; that they were sufficiently close together to give a good bearing for the rail; and that the road was well ballasted with gravel around the ties. Under such evidence, there is no case to go to the jury, and the judge ought to grant a nonsuit.⁶

§ 13. Negligence of Manufacturer or Contractor imputed to Carrier.—The negligence of the manufacturer of a railway coach is to be imputed to

¹ *Supra*, § 9.

² *Brehm v. Great Western R. Co.*, 34 Barb. 256. See also *Palmer v. Andover*, 2 Cush. 600; *Titcomb v. Fitchburg R. Co.*, 12 Allen, 254; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; *Lords Bailiff-Jurats of Romney Marsh v. Trinity House*, L. R. 5 Exch. 204 (affirmed, L. R. 7 Exch. 247); *Achison v. King*, 9 Kan. 550; *Clark v. Barrington*, 41 N. H. 52; *Kelsey v. Glover*, 15 Vt. 708; *Lower Macungie Township v. Merkhoffer*, 71 Pa. St. 276; *Hey v. Philadelphia*, 81 Pa. St. 44; *Morse v. Richmond*, 41 Vt. 435; *Seigel v. Eisen*, 41 Cal. 109; *Tucker v. Henniker*, 41 N. H. 317; *Winship v. Enfield*, 42 N. H. 197; *Woodward v. Aborn*, 35 Me. 271; *Macanley v. New York*, 67 N. Y. 602; *Thomas v. Hook*, 4 Phila. 119; *Holley v. Winooski Turnpike Co.*, 1 Aik. 74;

Byrne v. Wilson, Irish Rep. 15 C. L. 332; *Hunt v. Pownal*, 9 Vt. 411; *Powell v. Deveny*, 3 Cush. 300; *Joliet v. Verley*, 35 Ill. 58; *Lacon v. Page*, 48 Ill. 499; *Aurora v. Puifer*, 56 Ill. 270; *Hull v. Kansas City*, 54 Mo. 598; *Ward v. North Haven*, 43 Conn. 148; *Baldwin v. Greenwoods Turnpike Co.*, 40 Conn. 238. *Contra*, *Wilson v. Susquehanna Turnpike Co.*, 21 Barb. 68; *Bigelow v. Reed*, 51 Me. 325; *Proctor v. Jennings*, 6 Nev. 83. Compare *Parker v. Union Woollen Co.*, 42 Conn. 399. ³ *Brehm v. Great Western R. Co.*, 34 Barb. 256.

⁴ *McElroy v. Nashua etc. R. Corp.*, 4 Cush. 400.

⁵ See *McPadden v. New York etc. R. Co.*, 44 N. Y. 478.

⁶ *Ibid.* (reversing *s. c.* 47 Barb. 247).

Negligence of Manufacturer or Contractor.

the carrier. It is not sufficient that the carrier assures himself that the manufacturer is of good repute in his business. If the manufacturer has failed to apply a reasonable test which would have ascertained the defect, the carrier is answerable for the consequences of this negligence, as though it had been his own.¹ This doctrine is denied by the Supreme Court of Michigan in a late case, but upon reasons which are believed to be unsound.²

It follows that a special plea by the carrier setting up the following facts is no defence: That the accident complained of happened in consequence of a fracture in a crank-pin of one of the carriages in which the plaintiff was being carried at the time; "that the said fracture was occasioned by an original defect in the material and construction of the crank-pin, and in the inside or centre thereof, which said defect, before the fracture occurred, was not capable of being detected by the defendants upon due and proper examination or observation; that the said crank-pin was purchased, together with the said locomotive engine, by the defendants in the due course of business, from competent manufacturers thereof, and was not made by the defendants; and that on the day in the said first count mentioned, and shortly before the commencement of the said journey, the defendants duly and properly examined the said locomotive engine and crank-pin, and had not, at any time before the said fracture, any notice of the said defect in the crank-pin." The reason given for this conclusion is that this plea does not contain any averment as to the care or skill applied to the manufacture of the engine, or as to the care or skill exercised by them in the selection or inspection of it. All the averments are quite consistent with gross and culpable carelessness on the part of the manufacturers, and with gross and culpable negligence on their part in the purchase of it from the manufacturers. "If they had been themselves the manufacturers of the engine, they would have been bound to appear and prove that due care and skill had been exercised in the process of its manufacture. Are they to be relieved from legal liability because they allege that they have purchased it from a competent manufacturer? I think that would be a distinction dangerous to the public, and that, as ALDERSON, B., says, 'railway companies might buy ill-constructed or unsafe vehicles and the public be without remedy.'"³

In like manner, where the accident arose from the breaking of a bridge, the fact that the carrier may have engaged the services of competent engineers, though a proper matter to be considered on the question of negligence, will not exonerate him if the work is deficient; since this is only one element of diligence; he is still bound to adopt the best methods and make use of the best materials.⁴ He is also under a continuing duty of inspection and repair. So also, if the railway company, whilst using its track for the carriage of passengers, engages in a work to be done in the immediate proximity of its track, negligence in the performance of which would, in the opinion of cautious persons, endanger the passage of its cars, and an accident to a passenger is caused

¹ *Hegeman v. Western R. Corp.*, ante, p. 160; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 232; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; *Burns v. Cork etc. R. Co.*, Irish Rep. 13 C. L. (N. S.) 543.

² *Grand Rapids etc. R. Co. v. Huntley*, 33 Mich. 537.

³ *Burns v. Cork etc. R. Co.*, Irish Rep. 13 C. L. (N. S.) 543. Opinion by Pigot, C. J.

⁴ *Grote v. Chester etc. R. Co.*, 2 Exch. 251; s. c. 5 Eng. Rail. Cas. 649. To the same effect is *Brehm v. Great Western R. Co.*, 34 Barb. 256.

Notes.

by an obstruction arising from negligence in the performance of such work, the company must pay damages: it will be no defence that the work was placed in the hands of a contractor, and that the negligence which caused the injury was that of one of his employees. Thus, through the negligence of the servants of a contractor for the doing of certain stone-work for a railway company, a stone was rolled or shaken from an embankment, and rolled under the wheels of a passenger-train, throwing a car from the track and injuring a passenger. This was a case for damages.¹

On the other hand, where an accident has happened from the breaking of some portion of the carrier's vehicle, — as, for instance, a car-wheel, — and there is no complaint that the train was not driven in a proper manner and by competent persons, the carrier will rebut the presumption of negligence, as shown in another section,² arising from the happening of the accident, by showing that the wheel was the work of a skilful manufacturer, and that it was of the kind usually employed in the service, and had been subjected to and withstood the usual tests.³

§ 14. **This Obligation of the Carrier, how affected by Statute.** — Compliance with the requirements of a statute enacted to promote the safety of passengers will not of itself exonerate the carrier,⁴ although a failure to comply with it would be what the courts frequently term *negligence per se*; that is, the injured passenger recovers damages without proof of any other negligence than a failure on the part of the carrier to comply with the statute.⁵ Thus, a statute requiring railroad companies to fence their tracks has been construed as enacted for the purpose, in the main, of protecting the lives of those transported upon such roads.⁶ Hence, if any animal gets on the track in consequence of its being unfenced, and a train runs upon it and is thereby thrown from the track, and in the accident a passenger is injured, there is a clear case for recovery of damages against the company, although those in charge of the train were guilty of no personal negligence in running over the animal.⁷

In 1838, Congress passed an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam.⁸ This

¹ Virginia etc. R. Co. v. Sanger, 15 Gratt. 230. The case turned chiefly on the propriety of the instructions to the jury.

² *Supra*, § 9.

³ Toledo etc. R. Co. v. Beggs, 85 Ill. 80. This was the rule laid down in Illinois etc. R. Co. v. Phillips, 49 Ill. 234, where the action was for injuries received by the explosion of a boiler of one of the company's locomotives, injuring the plaintiff, who was a bystander. Compare Losee v. Buchanan, 51 N. Y. 476; s. c. 61 Barb. 86; 1 Thomp. on Neg. 47; Marshall v. Wellwood, 38 N. J. L. 339; Spencer v. Campbell, 9 Watts & S. 32; Witte v. Hague, 2 Dow. & Ry. 33; Jones v. Yeager, 2 Dill. 64; Morris v. Gleason, 1 Bradw. 510; Allerton Packing Co. v. Egan, 86 Ill. 253; s. c. 18 Alb. L. J. 295; 10 Ch. Leg. N. 169; Keegan v. Western R. Corp., 8 N. Y. 175; s. c. Seld.

Notes, 44; Cayzer v. Taylor, 10 Gray, 274; Noyes v. Smith, 28 Vt. 59; Columbus etc. R. Co. v. Arnold, 31 Ind. 177. The rule of the New York Court of Appeals, as embodied in the case of Hegeman v. Western R. Corp., *ante*, p. 160, is more stringent.

⁴ Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Brown v. New York etc. R. Co., 34 N. Y. 404 (reversing s. c. 31 Barb. 385).

⁵ Blair v. Milwaukee etc. R. Co., 20 Wis. 254.

⁶ Corwin v. New York etc. R. Co., 13 N. Y. 42, 53, per Denio, J.; Blair v. Milwaukee etc. R. Co., *supra*.

⁷ Blair v. Milwaukee etc. R. Co., *supra*.

⁸ 5 U. S. Stats. at Large, 304. Under this statute, an action could be maintained either where the injury was to a member of the crew of the boat whose boiler exploded, or

Statutory Liability — Steam-Vessels.

statute provided for the inspection, by officers appointed for that purpose, of the boilers and machinery of steam-vessels. It was made the duty of the owner of such vessels to cause such inspections to be made, and licenses were granted only after obtaining the inspector's certificate. This system of governmental supervision of steam-vessels was further extended,¹ until in 1871 an elaborate statute was passed, covering in a most careful manner the whole subject.² It has been held that this legislation was not intended to limit the common-law liability of ship-owners as carriers of passengers. Its object was to provide additional safeguards. A failure to comply with its provisions would subject the owners of steam-vessels to its penalties, and also to an action for negligence; but the statute neither takes away any common-law liability nor any common-law remedy.³ Therefore, although the owner of a steamboat, whose negligence has resulted in injury to a passenger, had complied with all the requirements of the act in question, he may still be liable for negligence. The presumption of negligence, arising from the bursting of the boiler, did not depend upon the statute, but arose from the rule of the common law that where an act takes place which usually and according to the ordinary course of things would not happen if proper care were exercised, it is presumed that such care was not observed. The provisions of the statute in this respect are not in conflict with the common law; but if they were, it is said with obvious propriety, that they would fall within the principle that rules of evidence prescribed by Congress are not binding upon the State courts.⁴

It is a general rule that whenever a statute imposes upon a person or corporation a duty to be performed for the benefit and security of the public distributively, any person sustaining specific damage by a failure to perform such duty, may maintain an action therefor.⁵ This rule obviously holds good under this statute; but the forty-third section of the statute gives an action for a failure to comply with its provisions, in the following language:—

"And be it further enacted, That whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured, to the full amount of damage, if it happens through any neglect or failure to comply with the provisions of law herein prescribed, or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of any captain, mate, engineer, or pilot, or his neglect or refusal to obey the provisions of law herein prescribed as to navigating such steamers, may sue such captain, mate, engineer, or pilot, and recover damages for any such injury caused as aforesaid by any such captain, mate, engineer, or pilot."

Although this statute nowhere contains any express prohibition of the use of

a passenger on another boat. *McMahon v. Davidson*, 13 Minn. 357; *May v. Davidson*, 13 Minn. 523, 537.

¹ 10 U. S. Stats. at Large, 61; 14 *id.* 227.

² Act of February 28, 1871 (16 U. S. Stats. at Large, 440; embodied in the Rev. Stats., §§ 4399-4462.

³ *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, 292; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 141.

⁴ *Caldwell v. New Jersey Steamboat Co.*, *supra*.

⁵ For a discussion of this principle, see 6 South. L. Rev. (N. S.) 29, 31.

Notes.

a pressure of steam beyond the amount allowed by the inspector's certificate, yet it has been held to contain such a prohibition by implication, and to raise a statutory liability actionable under the forty-third section.¹

III. RAILWAY CARRIERS.

§ 15. Duties of Railway Companies in general. — In most of the foregoing cases the carriers sought to be charged with liability were railway companies. It will not be possible to suggest any distinct particulars in which their liability differs from that of other carriers, except that as the means adopted by them are greatly more dangerous to the passenger, the care demanded of them must correspondingly increase. And this is equally true under the American rule, which exacts an extreme degree of care,² and under the English rule, which measures their liability by the standard of ordinary or reasonable care.³ For ordinary or reasonable care is a varying quantity, increasing or diminishing according to the increase or diminution of the risks attending the business;⁴ and it has been well said by one eminent court, and often repeated by others, that in case of railway carriage by steam the risks of human life and limb are so great that any negligence may well deserve the epithet of gross.⁵

Such companies must adopt such rules and regulations for the running of their trains as will insure safety, and after adopting them they must conform to them, or be responsible for injuries to passengers resulting from a departure from them.⁶ This duty they owe, not only to their passengers, but to their employees.⁷ It is also obvious that railway companies are under an obligation not to *overload* their vehicles, similar to that which has been put upon stage proprietors.⁸ But they are under an obligation to carry safely and comfortably all proper persons who may apply to be carried, tendering the requisite fare.⁹ Great difficulty may be experienced at times in discharging this obligation, especially during the periods of fairs or great public gatherings. If a railway coach breaks down in consequence of being overloaded, there will be no difficulty, on principles already stated, in holding that the company will be liable for any injury which may thereby happen to passengers. But if a passenger in an overloaded railway coach is injured in consequence of something not directly connected with the fact that the coach is overloaded, he will not be entitled to recover damages of the company for their negligence in this particular. This is very clear, as a

¹ *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 141. It must be confessed that the ground on which this conclusion is based is not made very clear in the opinion of the court. To have held the defendant liable at common law simply, and to have applied the rule laid down in *Parnaby v. Lancaster Canal Company*, 1 *Thomp. on Neg.* 541, that although the plaintiff may have declared on a statute, yet if it could be collected from the allegations of his declaration that there was a liability at common law, the declaration would be held good, and the case would go to a jury.

² *Supra*, § 4, subsect. 2. ⁴ *Supra*, § 6.

⁴ 1 *Thomp. on Neg.*, pp. 46, 238.

⁵ *Grier, J.*, in *Phila. etc. R. Co. v. Derby*, *ante*, p. 31; *Str. New World v. King*, *ante*, p. 175.

⁶ *Chicago etc. R. Co. v. George*, 19 Ill. 510.

⁷ *Cooper v. Iowa Central R. Co.*, 44 Iowa, 134; *Chicago etc. R. Co. v. Taylor*, 69 Ill. 461; *Vose v. Lancashire etc. R. Co.*, 4 *Hurl. & N.* 728.

⁸ *Infra*, § 24.

⁹ *Davis v. Kansas etc. R. Co.*, 53 Mo. 317, 320; *Bass v. Chicago etc. R. Co.*, 36 Wis. 450, 461; *Thorpe v. New York etc. R. Co.*, 13 Hun, 70, 75; *Willis v. Long Island R. Co.*, 32 Barb. 399 (*s. c.* affirmed in 34 N. Y. 670).

Time for Passenger to get on and off.

general statement of doctrine; but the application which it received in a very greatly discussed case in the House of Lords may, we think, be doubted. In that case it appeared that the plaintiff was a passenger by the defendants' railway. The carriage in which he rode was full. At a certain station (Gower Street) three persons forced themselves in, and were obliged to stand. At the next station (Portland Street) there was a rush of fresh passengers, by whom the door of the carriage was opened from the outside, and who endeavored to crowd their way in. The plaintiff voluntarily rose, or partly rose, from his seat to push these persons back. The train moved; the plaintiff, to save himself from falling, put his hand upon the edge of the door of the carriage; at that moment a railway porter came up, pushed away the persons trying to get in, and slammed the door to, in doing which the plaintiff's thumb was caught and crushed. It was held that this evidence did not establish such negligence on the part of the company as could be said to have occasioned the mischief. Said the Lord Chancellor (Lord Cairns): "In the present case there was no doubt negligence in the company's servants, in allowing more passengers than the proper number to get in at the Gower Street station; and it may also have been negligence, if they saw these supernumerary passengers, or if they ought to have seen them, at Portland Road, not to have removed them; but there is nothing, in my opinion, in this negligence which connects itself with the accident that took place."¹

§ 16. **Duty to afford a Reasonable Time for Passengers to get on and off Trains.**—The passenger is entitled to have a reasonable time within which to board the train after its arrival at the station. Any movement of the train which is made after it has once come to a full stop should be preceded by ample warning to all passengers who may be in the act of getting on.² Where a person accompanies a passenger to the train, it has been held that he is entitled to a reasonable time to place his charge upon board, and the neglect of the train-men to give the customary signals of departure, whereby such person is injured in getting off the train, amounts to negligence for which he may hold the company responsible.³ The Supreme Court of Missouri, in the case last cited, adopted a rule contrary to the decision of the Supreme Judicial Court of Massachusetts in *Lucas v. New Bedford, etc. Railroad Company*,⁴ that such a person is not entitled to special notice of the departure of the train; that the defendants may be said to have operated their train with "ordinary care" although no such notice is given such person of the departure.⁵

¹ Metropolitan R. Co. v. Jackson, 3 App. Cas. 193, 198.

² Curtis v. Detroit etc. R. Co., 23 Wis. 152; s. c. 27 Wis. 153.

³ Doss v. Missouri etc. R. Co., 59 Mo. 27.

⁴ 6 Gray, 64.

⁵ The conclusion of the Missouri court may perhaps be questioned. The status of such persons would seem to be similar to that of licensees, who take the license they enjoy *cum periculo*. Sutton v. New York etc. R. Co., 66 N. Y. 243; s. c. 4 Hun, 760; Nicholson v. Erie R. Co., 41 N. Y. 525. It

is indeed proper that persons having duties to perform incidental to the departure of passengers should be entitled to the same protection which is the due of every person who comes upon another's premises by invitation, express or implied. This rule has been expressed with clearness and accuracy by the present Chief Justice of the Massachusetts Court: "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by

Notes.

If the company have been in the habit of receiving and discharging passengers at a place other than their regular station, it is not negligence for a passenger to get on at that place while the train is standing still and there is no apparent danger in so doing. It is the duty of the train-men to give the customary signals before starting away from such a place.¹ If the train does not stop at a station, the passenger will not be justified in making an attempt to get on. Thus, the plaintiff having purchased his ticket, attempted to get upon the cars while slowly passing the station. The platform and steps were so full that he could only get upon the lower step. A jerk of the cars threw him off, but he held on to the iron rod and ran along with the cars, endeavoring to recover his position on the step (although the speed of the train was increasing), when he was struck by a platform near the track and was injured. No evidence was given tending to prove facts explaining or justifying this negligent and reckless conduct, and a nonsuit was held proper.² But in cases where the effort of the passenger to board the train does not so plainly demonstrate negligence on his part, the question is properly one for the jury. It cannot be said that under all circumstances an attempt to board a train when in motion will constitute negligence as a matter of law.³

Railway companies, in order to afford an opportunity to passengers to leave the cars at their places of destination, are bound to have announced the names of the different stations upon the arrival of the train, and then stop their trains a sufficient length of time to allow passengers to get off without danger or injury to their persons.⁴ But it would seem to be negligence on the part of the servants of the railroad company to announce a station and then stop the train short of such station in the night-time. When the station is called, the

him, for an injury occasioned by the unsafe condition of the land, or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist, and has given them no notice of." *Carleton v. Franconia Iron Co.*, 99 Mass. 216, 217. This rule was properly held applicable, in *Tobin v. Portland etc. R. Co.*, 59 Me. 183, to the case of a hackman who was injured by stepping into a hole in the platform of a railroad station. The cases cited by the learned judge who delivered the opinion in *Doss v. Missouri etc. R. Co.* do not warrant the conclusion reached in that case. The language cited from *Gillis v. Pennsylvania R. Co.*, 59 Pa. St. 129; s. c. 8 Am. L. Reg. (N. S.) 729, is in its terms limited to the case of a person injured from a defective condition of the premises. In *Holmes v. North-Eastern R. Co.*, L. R. 4 Exch. 254; s. c. L. R. 6 Exch. 123, the injury arose from the same cause, and the express ground of the decision was that the plaintiff was not a mere licensee, but, being a consignee of freight, had a right to be where he was. *Gantret v. Eger-ton*, L. R. 2 C. P. 371, was evidently cited by mistake, as it establishes precisely the

contrary principle. The plaintiff, a licensee, having been injured in the enjoyment of his privilege of crossing a private bridge, *Keating, J.*, said; "I am utterly unable to discover any duty which the defendants have contracted towards the persons whom the plaintiffs represent, or what particular breach of duty is charged."

¹ *Keating v. New York etc. R. Co.*, 49 N. Y. 673; s. c. 3 Lans. 469. See also *Mitchell v. Western etc. R. Co.*, 30 Ga. 22.

² *Phillips v. Rensselaer etc. R. Co.*, 49 N. Y. 177. See also *Knight v. Pontchartrain R. Co.*, 23 La. An. 462; *Hubener v. New Orleans etc. R. Co.*, 23 La. An. 492; *Harper v. Erie R. Co.*, 32 N. J. L. 88; *Chicago etc. R. Co. v. Scates* (Sup. Ct. Ill. 1879), 9 Cent. L. J. 167.

³ *Johnson v. West Chester etc. R. Co.*, 70 Pa. St. 357.

⁴ *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Imhoff v. Chicago etc. R. Co.*, 20 Wis. 344; *Keller v. New York etc. R. Co.*, 2 Abb. App. Dec. 480; s. c. 17 How. Pr. 102; *Dickens v. New York etc. R. Co.*, 1 Abb. App. Dec. 501; s. c. 28 Barb. 41; *New Orleans etc. R. Co. v. Statham*, 42 Miss. 607.

Time for Passengers to get on and off.

passengers have a right to infer that the first stop of the train will be at such station.¹

The implied contract to carry safely includes the duty of giving the passengers reasonable opportunity to alight in safety from the train, and a violation of this part of the company's duty is culpable negligence for which an action will lie.² But although the carrier may have been negligent in this particular, yet, in general, the passenger will not be justified in leaping from the train after it has started, and in the face of obvious danger.³ Circumstances of paramount necessity may exist which will justify a person in leaping from the train while in motion, after the cars have failed to stop a reasonable length of time for the passenger to get off. Thus, in *Pennsylvania Railroad Company v. Kilgore*,⁴ the plaintiff, accompanied by three young children, on arriving at her destination proceeded to alight; two of the children had done so, and while the plaintiff was still on the train, the cars started, when she sprang upon the platform of the station, on which one of the children had fallen prostrate, and was injured. It was held that her conduct was not such negligence as would prevent her recovery of damages for injuries thus sustained.⁵ If the motion of the train is so slow that the danger of jumping off would not be apparent to a reasonable person, and the passenger acts under the instructions of the company's brakeman or conductor in so doing, and is injured, then the injury cannot be said to be the result of contributory negligence on the part of the passenger.⁶

¹ *Central R. Co. v. Van Horn*, 38 N. J. L. 133. When a railroad train has come to a full stop for the purpose of enabling passengers to alight, and, without notice, the train is suddenly moved, causing injury to those alighting, it is held immaterial, upon the question of negligence, whether such motion is in a backward or forward direction. *Milliman v. New York etc. R. Co.*, 66 N. Y. 642; s. c. 6 Thomp. & C. 585.

² *Fairmount etc. R. Co. v. Statler*, 54 Pa. St. 375; *Roberts v. Johnson*, 58 N. Y. 613; s. c. 5 Jones & Sp. 157; *Houston etc. R. Co. v. Gorbett*, 49 Texas, 573; *Mulhade v. Brooklyn etc. R. Co.*, 30 N. Y. 370; *Jeffersonville etc. R. Co. v. Parmalee*, 51 Ind. 42. A passenger has the right to expect not only that the cars will remain stationary long enough for him to step from the train, but also that the servants of the defendant will be present to assist him in so doing, if necessary. *Jeffersonville etc. R. Co. v. Hendricks's Administrator*, 26 Ind. 228; s. c. 41 Ind. 49. *Contra*, *New Orleans etc. R. Co. v. Statham*, 42 Miss. 607. But the servants of a railroad company cannot be expected to act with reference to a passenger's disabilities, unless made known to them. *Toledo etc. R. Co. v. Baddeley*, 54 Ill. 19. If, however, being informed, they do so act, the company will be responsible for their negligence in view of such knowledge. *Columbus etc. R. Co. v. Powell*, 40 Ind. 37. The fact that a man is

intoxicated does not alone deprive him of the right to ride upon a railway train, nor does it free the company from its duty to render him, as a passenger, due care. *Milliman v. New York etc. R. Co.*, 61 N. Y. 642; s. c. 6 Thomp. & C. 585.

³ *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Jeffersonville etc. R. Co. v. Hendricks's Administrator*, 26 Ind. 228; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Burrows v. Erie R. Co.*, 63 N. Y. 556 (reversing s. c. 3 Thomp. & C. 44); *Damont v. New Orleans etc. R. Co.*, 9 La. An. 441; *Dougherty v. Chicago etc. R. Co.*, 86 Ill. 467; *Gavett v. Manchester etc. R. Co.*, 16 Gray, 501; *Lucas v. New Bedford etc. R. Co.*, 6 Gray, 64; *Ginnon v. New York etc. R. Co.*, 3 Robt. 25. But, although it may be mere recklessness for a person to jump from a railroad train when it is in rapid motion, yet the motion may be so slow that it will be a question for the jury whether it is negligence to make a leap from the train, taking into consideration the physical condition of the person so doing, and all the attendant circumstances. *Doss v. Missouri etc. R. Co.*, 59 Mo. 27, 38; *Illinois etc. R. Co. v. Able*, 59 Ill. 131.

⁴ 32 Pa. St. 292.

⁵ See also *Loyd v. Hannibal etc. R. Co.*, 53 Mo. 509, a case in which the facts were identical with those above set out.

⁶ *Georgia R. etc. Co. v. McCurdy*, 45 Ga. 288; *Lambeth v. North Carolina R. Co.*, 66 N.

Notes.

But where, in such case, there was a conflict of evidence as to whether the person who advised the passenger to jump from the train was a servant of the company, a charge to the effect that it was immaterial who gave the direction, and that it was for the jury to say whether it was prudent for the passenger, acting under the advice so given by anybody, to alight from the train, was held erroneous.¹ So, where the plaintiff attempted to alight from the train while in motion, with the assistance of another person not a servant of the company, and was injured, it was held that the result demonstrated that the injury arose from the fact that the train was going at such a speed that the attempt ought not to have been made, or the accident was due to the carelessness of the person lending assistance; therefore in neither event could the company be responsible for the injury.²

§ 17. **Trains overshooting or falling short of the Platform of the Station.**—It is the duty of servants of the railway company to run their trains so that a passenger shall have a reasonably safe and convenient place for alighting. It frequently happens, however, that from various causes the passenger-coaches are brought to a stand at places where there is no platform or other conveniences for alighting, and injuries result to passengers attempting to get off the train under these circumstances.

It is commonly alleged, by way of defence, that the passenger was under no obligation to encounter danger in alighting at a dangerous place; that he might have remained in the train, and sued the company for its breach of contract in failing to put him down at his destination. This view properly prevails in cases where the passenger, to avoid the inconvenience of being carried beyond his destination, leaps from a train in rapid motion, as that is a step which no reasonable man would take without expecting the consequences of failure to reach the ground safely to be visited upon himself;³ but in cases of the character under discussion the danger of alighting is usually neither so apparent nor real, and, in

C. 494; *Lovett v. Salem R. Co.*, 9 Allen, 557; *Filer v. New York etc. R. Co.*, 68 N. Y. 124; s. c. 59 N. Y. 351; 49 N. Y. 47; *Pennsylvania R. Co. v. McCloskey's Administrator*, 23 Pa. St. 526; *Wyatt v. Citizens' R. Co.*, 55 Mo. 485. If the conductor or other servant of a railroad company, authorized to assist passengers on and off the train, takes hold of a passenger and assists him off the train while in motion, the company will be responsible for any negligence on the part of its servant in so doing. If such servant is informed by the passenger of any disability by which he is affected, it is his duty to use such care as the condition of the passenger requires. *Columbus etc. R. Co. v. Powell*, 40 Ind. 37. The fact that a passenger, in alighting from the train while in motion, does so under the advice of the conductor, and receives injury, is not conclusive of the liability of the railway company. It is a proper question for the jury whether a reasonable man would have acted upon the

advice given. *Hazard v. Chicago etc. R. Co.*, 1 Biss. 503; *Chicago etc. R. Co. v. Randolph*, 53 Ill. 510. Information by a conductor of a freight-train to a passenger of mature age, and accustomed to travelling, that persons sometimes got off at a particular place where the train was not stopped but the speed slackened, does not require the passenger to leave the car at such place, and in the event of injury to the passenger in attempting to leave, the company will not be responsible. *Chicago etc. R. Co. v. Hazard*, 25 Ill. 373. See also *Ginnon v. New York etc. R. Co.*, 3 Robt. 25.

¹ *Filer v. New York etc. R. Co.*, 59 N. Y. 351.

² *Burrows v. Erie R. Co.*, 63 N. Y. 556 (reversing s. c. 3 Thomp. & C. 44).

³ *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Jeffersonville etc. R. Co. v. Hendricks's Administrator*, 26 Ind. 228; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Damont v. New Orleans etc. R. Co.*, 9 La. An. 441; *Dougherty v. Chicago etc. R. Co.*, 86 Ill. 467.

 Invitation to alight.

general, the contention that the passenger alights at his peril has not met with favor. The remarks of BRETT, J., though made in a case not presenting the circumstances under discussion,¹ have great force. He said: "It has been argued that no amount of inconvenience, if there be no actual peril, will justify a person incurring danger in an attempt to get rid of it. I confess I am not prepared to go to that length. I think if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience."² And Chief Baron KELLY's language in his dissenting opinion in *Siner v. Great Western Railway Company*³ is much to the same effect, and is probably now recognized as a more correct exposition of the law than the views of the majority of the court in that case. Said he: "I am clearly of opinion, however, that a railway company are not entitled to expose any passenger to the necessity of choosing between two alternatives, neither of which he could lawfully be called on to choose, namely, either to go on, or to take his chance of danger and jump out; and if they do so, the choice is made at their peril. I agree that if it can be clearly seen by the passenger that the act must be attended with injury, it may then be fairly contended that he is not entitled to choose this obviously and certainly dangerous alternative. * * * Yet when he is called upon to choose between two evils to which the neglect of the company has exposed him, and one of which presents some degree of danger, but not such as he may not without imprudence encounter, if in consequence of his adopting that alternative he suffers any injury, that injury is the proper subject of an action against the company."⁴

§ 18. *Invitation to alight, express or implied.*—In cases of this kind, when it can be shown that the passenger received an express invitation to alight, or an intimation that no better opportunity would be offered, although the carriages of the train were in an inconvenient or slightly dangerous position for this purpose, the passenger is, in general, justified in making the attempt. Thus, in *Foy v. London, etc. Railway Company*,⁵ a frequently cited case, the facts were that on the arrival of the train at the London terminus of the road, the whole of the train by which the plaintiff travelled was unable to come up to the platform, in consequence of two trains standing ahead of it on the track, and the plaintiff was requested by a porter to alight at a spot a little below the end of the platform. The distance from the floor of the carriage to the ground was about three feet, and there were two steps leading down from the carriage. The lady placed her foot upon the first step, took the hand of a gentleman, jumped down, and sustained a serious spinal injury. The jury having found that the company

¹ *Adams v. Lancashire R. Co.*, L. R. 4 C. P. 739.

² L. R. 4 C. P. 739. See these remarks approved in *Gee v. Metropolitan R. Co.*, L. R. 8 Q. B. 161, 173; and in *Robson v. North-Eastern R. Co.*, L. R. 10 Q. B. 271.

³ L. R. 3 Exch. 150, 156.

⁴ This language received the express approval of the court in *Delamaty v. Mil-*

waukee etc R. Co., 24 Wis. 578, 586. See also *Nicholls v. Great Southern R. Co.*, Irish Rep. 7 C. L. 40; *Thompson v. Belfast etc. R. Co.*, Irish Rep. 5 C. L. 517; *Robson v. London etc. R. Co.*, L. R. 10 Q. B. 271; *Cockle v. London etc. R. Co.*, L. R. 5 C. P. 457; *Weller v. London etc. R. Co.*, L. R. 9 C. P. 136.

⁵ 18 C. B. (N. S.) 225; s. c. 13 Week. Rep. 293; 11 L. T. (N. S.) 606.

Notes.

were guilty of negligence in not providing reasonable means for alighting, and that the lady had not by any misconduct contributed to the injury, the court held that there was evidence to warrant their finding, and refused to grant a new trial or an appeal.

What will constitute an implied invitation to alight is a fruitful source of controversy. It is sometimes contended that the train-men calling out the name of a station, on approaching it, is an invitation to alight as soon as the train has come to a full stop. But this cannot be true as a proposition of law. Indeed, in some cases it has been held that this circumstance was not even evidence of an invitation to alight. Said BLACKBURN, J.: "Calling out the name of the station, I understand, and have always understood, to mean this: that it is an intimation to all who are travelling by the train that the station at which the train is about to stop is that particular station. * * * Calling out the name of a station is not an invitation to alight."¹ This same distinguished judge, at *nisi prius*, adhered to this opinion in the case of *Bridges v. North London Railway Company*.² The facts of this case were, that the plaintiff's husband was seated in the last carriage of a railway train. Before reaching the station at which he was to alight, the train had to pass through a tunnel. This tunnel was adjacent to the station, and on this occasion, when the train stopped, the carriage in which the plaintiff's husband was seated remained inside the tunnel for a considerable distance. There was no platform in the tunnel opposite where this carriage stopped, but instead, an irregular heap of hard rubbish. On clear nights the tunnel was only imperfectly lighted, and on this night, being filled with steam, it was practically without light. The name of the station was called out as the train stopped. A passenger got out of the next car forward of that in which the plaintiff's husband was riding, and hearing a groaning, went farther back into the tunnel and found him lying on the rubbish, having received a broken leg and other injuries in alighting, from the effects of which he died. After alighting, the witness heard the warning, "Keep your seats," and shortly afterwards the train moved on. Mr. Justice BLACKBURN was of opinion that there was no evidence of negligence on the part of the defendants, and directed a nonsuit; but the jury expressing a strong opinion to the contrary, a verdict was taken for the plaintiff, and damages assessed. The nonsuit was then entered, but leave reserved to move to enter the verdict for the plaintiff for the damages assessed. A rule was accordingly moved for, and, after argument in the Queen's Bench, was refused.³ On appeal to the Exchequer Chamber, the facts were stated in a "case," power being reserved to the judges to draw inferences of fact. The judgment of the court below was affirmed by four judges against three.⁴ An appeal was then taken to the House of Lords.⁵ The judges were summoned, and opinions were delivered by five of them, they being unanimously of the opinion that there was evidence of negligence on the part of the defendants to go to the jury. The Lords laid down no rule as to what might be the consequence, as a positive rule of law, of calling out the name of the station by the company's servants, and concurred in the opinion of the judges as to the evidence

¹ *Lewis v. London etc. R. Co.*, L. R. 9 Q. B. 66; s. c. 43 L. J. (Q. B.) 8.

² L. R. 6 Q. B. 377; s. c. 40 L. J. (Q. B.) 188;

L. R. 7 H. L. 213; 43 L. J. (Q. B.) 151; 23 Week Rep. 62; 30 L. T. (N. S.) 844.

³ L. R. 5 C. P. 459, note (5).

⁴ L. R. 6 Q. B. 377. ⁵ L. R. 7 H. L. 213.

 Invitation to alight.

of negligence on the part of the defendants. The judgment of the Court of Exchequer Chamber was therefore reversed, and a verdict was entered for the plaintiff for the damages assessed.¹

In *Weller v. London, etc. Railway Company*,² on the approach of a train to the station, a porter called out the name of the station, and the train was brought to a stand-still. Hearing carriage doors opening and shutting, and seeing a person alight from the next carriage, the plaintiff (a season-ticket holder, accustomed to stop there) stepped out of the carriage in which he was seated, which had overshoot the platform, and falling upon an embankment, was injured. It was night, and there was no light near the spot, and no caution was given, nor any thing done to intimate that the stoppage was a temporary one only, or that the train was to be backed. BRETT, J., said:³ "I agree that to call out the name of the station before the train has come to a stand-still is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But if the porter has called out the name of the station, and the engine-driver has overshoot the station, and the train has come to a stand-still, the company's servants are guilty of negligence if they do not warn passengers not to alight. At all events, the jury may from the facts infer negligence."⁴

Conduct other than calling out the name of the station may be taken as evidence of an invitation to alight. In *Praeger v. Bristol, etc. Railway Company*,⁵ the plaintiff was seated in the last compartment of the last carriage. The train arrived at a dimly lighted station on a dark night. A guard opened the door, and said nothing. The platform did not run alongside the track the whole length of the train, but curved away from the line at the point where the plaintiff's carriage stood. The plaintiff stepped out, expecting to alight upon the platform, but fell between the carriage and the platform, and was injured. On these facts, Cock-

¹ Mr. Baron Pollock, in his opinion before the Lords (at p. 224), in regard to what effect, in general, was to be given to calling out the name of a station, concurred in the opinion of Mr. Justice WILLES in the same case in the Exchequer Chamber: "It is an announcement by the railway officers that the train is approaching or has arrived at the platform, and that the passengers may get out when the train stops at the platform, or under circumstances induced and caused by the company, in which the man reasonably supposes he is getting out at the place where the company intended him to alight." Mr. Justice Denman, while laying down no general rule on the subject, considered that "the jurors were entitled to consider that fact as one of importance in the case." Said Mr. Justice BRETT: "That seems to me to be a matter of experience of life and habits, which is solely for the determination of the jury."

In other cases, it has been held that it is a question for the jury whether calling out the name of a station amounts, under all the circumstances, to an invitation to alight.

See *Whittaker v. Manchester etc. R. Co.*, L. R. 5 C. P. 464, note (3); *Petty v. Great Western R. Co.*, L. R. 5 C. P. 461, note (1); *Scott v. Dublin etc. R. Co.*, Irish Rep. 11 C. L. (N. S.) 377; *Nicholls v. Great Southern etc. R. Co.*, Irish Rep. 7 C. L. 40.

² L. R. 9 C. P. 126; s. c. 43 L. J. (C. P.) 137; 22 Week. Rep. 302; 29 L. T. (N. S.) 888.

³ L. R. 9 C. P. 132.

⁴ To the same effect, see *Taber v. Delaware etc. R. Co.*, 71 N. Y. 489; *Central R. Co. v. Van Horn*, 38 N. J. L. 133; *Columbus etc. R. Co. v. Farrell*, 31 Ind. 408. *Contra*, *Pabst v. Baltimore etc. R. Co.*, 2 McArthur, 42. But this last decision is based upon the decision of the Court of Exchequer Chamber in *Bridges v. London etc. R. Co.* (L. R. 6 Q. B. 377), which was, however, subsequently reversed in the House of Lords (L. R. 7 H. L. 213), as above stated.

⁵ MS., 24 L. T. (N. S.) 105. Stated at length in *Cockle v. London etc. R. Co.*, L. R. 7 C. P., at p. 323, by Mr. Justice Cockburn, for the reason that, although it was an important case, it had not found its way into the regular series of reports.

Notes.

BURN, C. J., said: "He got out on the invitation of the guard who opened the door, which implied an invitation to alight, and, I think also, to alight with safety." Less than this was held to constitute an implied invitation to alight, in *Cockle v. London, etc. Railway Company*.¹ The relative situations of the platform and carriage were the same as in the previous case. The night was very dark, and although the rest of the station was well lighted, the place where the last carriage stopped, in which plaintiff rode, was not. The train was brought to a final stand-still, and was not again set in motion until it renewed its onward journey. The plaintiff opened the carriage door, and, stepping out, fell into the space between the carriage and the platform, and was injured. The court of Exchequer Chamber, overruling the decision of the equally divided judges of the Court of Common Pleas in this case,² held that the bringing up of the train to a final stand-still, for the purpose of the passengers alighting, amounted to an invitation to alight; at all events, after such time had elapsed that the passenger might reasonably infer that it was intended that he should get out if he purposed to alight at that particular station.³

Sometimes the conduct of the passenger in alighting at such a place is so manifestly contrary to the dictates of common prudence that his claim for damages for injuries received cannot be entertained. Thus, in *Harrold v. Great Western Railway Company*,⁴ the carriage in which the plaintiff was riding was carried beyond the station, and stopped upon an embankment above a roadway. The night was rather dark, and there was no light in the carriage, and no stationary light on the platform; nor was there any fence on the top of the embankment, between it and the roadway underneath. The plaintiff was aware that his carriage had overshot the platform, and, without waiting to see whether it would be backed up to the platform, got out of the carriage in the dark, and in so doing missed his footing and fell forward over the embankment into the roadway beneath. So in *Lewis v. London, etc. Railway Company*,⁵ the plaintiff saw that her carriage was not alongside the platform, but at the edge or corner of it, and that the engine and four carriages further forward were beyond the platform. Being well acquainted with the place, when the train stopped she immediately arose from her seat and prepared to get out with the assistance of a fellow-passenger. While alighting, the train began to move backward with a violent jerk, for the purpose of bringing all the carriages alongside the platform. The plaintiff was thrown from the steps of the carriage upon the end of the platform, and injured. The court held that from all the circumstances in the case the plaintiff must have believed that the train which had passed the platform would come back again, and that there was no evidence from which the jury could have reasonably found negligence in the company's servants. Where a railroad train is stopped at night merely for the purpose of allowing another train to pass, and no notice is given by servants of the company that passengers may leave the cars, they are not entitled to do so; and it is no justification that a

¹ L. R. 7 C. P. 321; s. c. 41 L. J. (C. P.) 140.

² L. R. 5 C. P. 457; s. c. 39 L. J. (C. P.) 226; 27 L. T. (N. S.) 320; 20 Week. Rep. 754.

³ In the case of *Robson v. North-Eastern R. Co.*, L. R. 10 Q. B. 271, presenting substantially the same facts, the same conclu-

sion was reached. See also *Nicholls v. Great Southern R. Co.*, Irish Rep. 7 C. L. 40; *Thompson v. Belfast etc. R. Co.*, Irish Rep. 5 C. L. 517.

⁴ 14 L. T. (N. S.) 440.

⁵ L. R. 9 Q. B. 66; s. c. 43 L. J. (Q. B.) 8.

Injuries to Passengers on the Track.

passenger was misinformed by some person not in the employment of the company that he must go and have his baggage passed at a custom-house, supposed to have been reached by the train, or that the train was near a passenger-station which was not the place of his destination.¹

The case of *Siner v. Great Western Railway Company*,² decided by the Court of Exchequer Chamber, affirming the decision of the court below, is probably more favorable to the defendant in this class of cases than any other in the reports. The circumstances were that an excursion train in which the plaintiffs (husband and wife) were passengers, on account of its length, overshot the platform when it arrived at its destination. It was then daylight. The passengers were not warned to keep their seats, nor was any offer made to back the train to the platform, nor was it in fact at all so backed, nor did it move until it started on its journey. After waiting a short time, the husband, following the example of other passengers, alighted without any request to the company's servants to back the train, or any communication with them. The wife, standing on the iron step of the carriage, took both his hands and jumped down, and in so doing strained her knee. There was a foot-board between the iron step and the ground, which she did not use; but there was no evidence of any carelessness or awkwardness in the manner of descent, except such as might be inferred from the above facts. It was held by both courts that there was no evidence for the jury of negligence in the defendants, and that the accident was entirely the result of the plaintiffs' own act.³

§ 19. *Injuries to Passengers on the Track.* — Although it is true, as a general rule, that a person who goes upon a railroad track is bound to know that it is a place of danger, and to use his eyes and ears constantly for his protection, the neglect of which precaution is negligence *per se*,⁴ yet this rule would seem not to apply where the arrangements of the railroad company are such that it is necessary for the passenger to pass over tracks in order to take and leave the trains. In such case, the railroad company are under a duty, by virtue of their contract for transportation, to provide safe and convenient means of entrance to and departure from their trains.⁵ Where, therefore, there is such a conflict in the running arrangements of the road that at the same time passengers are getting on or off a train at a station where they must cross over tracks in order to do so, trains are run over these tracks, this circumstance, especially where no reasonable notice is given of the approach of such trains, is an act of negligence on the part of the company, and has been justly reprobated.⁶

¹ *Frost v. Grand Trunk etc. R. Co.*, 10 Allen, 387.

² *L. R. 3 Exch. 150*; *s. c. L. R. 4 Exch. 117*; 37 *L. J. (Exch.) 98*; 17 *Week. Rep. 417*.

³ Similar cases subsequently decided are to the contrary. *Cockle v. London etc. R. Co.*, *L. R. 5 C. P. 457*; *Thompson v. Belfast etc. R. Co.*, *Irish Rep. 5 C. L. 517*; *Robson v. London etc. R. Co.*, *L. R. 10 Q. B. 271*; *Nicholls v. Great Southern R. Co.*, *Irish Rep. 7 C. L. 40*; *Welles v. London etc. R. Co.*, *L. R. 9 C. P. 125*; *Delamatyr v. Chicago etc. R. Co.*, 24 *Wis. 578*.

⁴ *Railroad Co. v. Houston*, 95 *U. S. 697*; *s. c. 6 Cent. L. J. 132*; *Bancroft v. Boston etc. R. Co.*, 97 *Mass. 275*; *Wilcox v. Rome etc. R. Co.*, 39 *N. Y. 358*; *Ernst v. Hudson etc. R. Co.*, 39 *N. Y. 61*; *Sutton v. Delaware etc. R. Co.*, 66 *N. Y. 243*; *Mulherrin v. Delaware etc. R. Co.*, 81 *Pa. St. 366*; *Illinois etc. R. Co. v. Hetherington*, 83 *Ill. 510*; *North Pennsylvania R. Co. v. Heileman*, 49 *Pa. St. 60*.

⁵ *Pennsylvania R. Co. v. Zebe*, 33 *Pa. St. 318*; *Klein v. Jewett*, 26 *N. J. Eq. 474*.

⁶ *Klein v. Jewett*, *supra*; *Terry v. Jewett*, 20 *Alb. L. J. 393*; *Chicago etc. R. Co. v. Wil-*

Notes.

§ 20. Degree of Care required in Transportation of Passengers on Freight-Trains. — When a railroad company chooses to carry passengers upon its freight-trains, the general rule of responsibility for their safety is in no degree relaxed, except that the passenger taking the freight-train accepts it and travels on it acquiescing in the usual incidents and conduct of a freight-train managed by prudent and competent men.¹ If the passenger will be inconvenienced more by submitting to the discomforts and dangers incident to this mode of travel than by waiting for the regular passenger-trains, he should adopt the latter course, as passage is granted upon these trains equally for his accommodation and the company's profit.

The company is held to as strict an accountability for the negligence of its employees in the management of a train with a caboose attached in which passengers are seated, as the law imposes in the transportation of passengers on trains specially provided for that purpose.² It cannot, however, be expected that a company will provide its freight-trains with all the conveniences and safeguards against danger which may properly be demanded of it in the construction and operation of cars designed solely for the transportation of passengers, viz., air-brakes, a bell-cord connecting the engine with the entire length of the train, and a brakeman upon every car.³ Such a train is deficient in these and many other particulars, and properly so. Thus, in *Chicago, etc. Railroad Company v. Hazard*,⁴ the plaintiff came upon the rear platform of the caboose with the intention of getting off the train while it was moving slowly through the town where he resided, as it was uncertain whether the train would stop there. While in this position, the caboose was jerked violently on account of the engineer increasing the speed of the train. The plaintiff was violently thrown over the end of the caboose, on account of the lack of a chain or bar in the centre of the rear platform. BREESE, J., held that this jerking was inevitable in the operation of a freight-train, and not ascribable to negligence, want of skill, or improper management of any agent or employee of the defendants; and that it was not negligence that there was no chain-guard upon the rear of the caboose, as there was no evidence that such an attachment was ever used on a caboose-car. The case was afterwards dismissed in the State court, and an action commenced in the Circuit Court of the United States for the Northern District of Illinois, in which DAVIS, J., submitted to the jury the question of the defendants' negligence in each of the foregoing particulars.⁵

The ordinary rule that the company must provide safe and convenient means

son, 63 Ill. 167; *Armstrong v. New York etc. R. Co.*, 66 Barb. 437; *Keller v. New York etc. R. Co.*, 24 How. Pr. 172; *Whaleu v. St. Louis etc. R. Co.*, 60 Mo. 323; *The State v. Grand Trunk R. Co.*, 58 Me. 176; *Dublin etc. R. Co. v. Slattery*, 3 App. Cas. 1155; *s. c. Irish Rep.* 10 C. L. 256; *Irish Rep.* 8 C. L. 531; 39 L. T. (N. S.) 265; 19 Alb. L. J. 70. But see *Falkiner v. Gt. Southern R. Co.*, *Irish Rep.* 5 C. L. 213.

¹ *Hazard v. Chicago etc. R. Co.*, 1 Biss. 503; *Indianapolis etc. R. Co. v. Horst*, 93 U. S. 291; *Ohio etc. R. Co. v. Dickerson*, 59 Ind. 317.

² *Chicago etc. R. Co. v. Hazard*, 26 Ill. 373; *s. c.* 1 Biss. 503; *Ohio etc. R. Co. v. Dickerson*, 59 Ind. 317; *Edgerton v. New York etc. R. Co.* 35 Barb. 389; *s. c.* 39 N. Y. 227; *Ohio etc. R. Co. v. Muhling*, 30 Ill. 9; *Ohio etc. R. Co. v. Selby*, 47 Ind. 471; *Flinn v. Phila. etc. R. Co.*, 1 Houst. 469.

³ *Hazard v. Chicago etc. R. Co.*, *supra*; *Indianapolis etc. R. Co. v. Horst*, 93 U. S. 291, 297; *s. c.* 15 Alb. L. J. 61; *Indianapolis etc. R. Co. v. Beaver*, 41 Ind. 493.

⁴ *Supra*.

⁵ 1 Biss. 503.

The Law as laid down by Mr. Justice Story.

of getting on and off trains¹ obviously has but slight application to the case of a passenger travelling upon a freight-train. The distinction is well pointed out by BELL, J., in *Murch v. Concord Railroad Company*:² "The party who makes an arrangement to be carried on a baggage-wagon or a freight-car impliedly agrees to accept and be satisfied with such accommodations, as regards carriages and seats, and places of entering and leaving the carriages, as may be found in the usual course of the business. If the cars, at the time of his agreeing for his passage and taking his seat, are at a merchandise-depot, he is to be satisfied with such means of entering the cars as are provided for rolling in the cask or box on which he is to be contented to take his seat if nothing better offers. If the cars are at the time standing upon a part of the track where there is no provision for landing or receiving either goods or passengers, he is to be satisfied with such means and facilities as may casually be within his reach. The company, considered as owners of the road or as carriers, are not, in either case, bound to make landings, or any provision whatever for the reception or discharge of passengers where none are expected to be. The duties and obligations of parties are construed reasonably, with reference to the nature of their business. We understand that the freight-trains upon these roads sometimes amount to fifty or more cars, and extend in length to two thousand feet or more, and that it depends upon what is, in this respect, mere matter of accident, the arrangement of the loading, where a place may be found for the casual passenger who may be forced to adopt this way of travelling. It may be at any part of the train, and provision must be made, if at all, for a safe entrance at every part of the train and at every part of the road where a passenger may desire to be put on board. A rule like that must be equivalent to a refusal to allow any passengers to be carried in this mode, unless they are at hand to take their places at the regular depots where the trains are loaded. It would be of mischievous consequence to adopt a rule which would deprive the railroad companies of the power to accommodate those whose occasions compel them to resort to these undesirable modes of conveyance."³

IV. STAGE PROPRIETORS.

§ 21. Duties of Stage Proprietors.—The Law as laid down by Mr. Justice Story.—We are indebted to Mr. Justice Story for a very clear and correct exposition of the duties of stage proprietors. It will be remembered that this eminent jurist was required, as a justice of the Supreme Court of the United States, to hold a Circuit Court in each of the New England States. This was before the era of railroads, and he was hence obliged to travel from circuit to circuit in the only means of overland conveyance of those days,—a stage-coach drawn by horses. No doubt he had personally a pointed experience of the dangers to which travellers are subjected by reason of stage-owners employing in their business unsafe or defective vehicles or tackle, untrained horses, and incompetent, drunken, or negligent drivers. This branch of jurisprudence, which we may here conveniently denominate "stage-coach law," therefore had a peculiar realism to his mind; and we have no doubt that we are indebted to

¹ *Supra*, § 16.² 29 N. H. 9, 42.Co., 56 Barb. 30; *Allender v. Chicago etc. R.*³ Compare *Dillaye v. New York etc. R.*

Co., 37 Iowa, 264.

Notes.

this circumstance for the stringent rule of the American courts, which puts upon carriers of passengers the highest degree of care, skill, and foresight consistent with the carrying on of their business. In his admired work on *Bailments*, that eminent judge thus sums up the duties of such carriers:¹—

“In the next place, they are bound to provide coaches reasonably strong and sufficient for the journey, with suitable harness, trappings, and equipments; and to make a proper examination thereof previous to each journey.² In other terms, they are bound to provide roadworthy vehicles, suitable for the safe transportation of the passengers. If they fail in any of these particulars, and any damage or injury occurs to the passengers, they will be responsible to the full extent thereof.³ Hence it has been held that if there is any defect in the original construction of a stage-coach,—as, for example, in an axletree,—although the defect be out of sight, and not discoverable upon a mere ordinary examination, yet if the defect might be discovered by a more minute examination, and any damage is occasioned to a passenger thereby, the coach proprietors are answerable therefor.⁴ The same rule will apply to any other latent defect which might be discovered by more minute examination and more exact diligence, whereby the work is not roadworthy, and a damage thereby occurs to any passenger. In this respect there does not seem to be any difference between the case of a coach which is not roadworthy and of a ship which is not seaworthy, as to the implied obligations of the owner.⁵

“In the next place, they are bound to provide careful drivers, of reasonable skill and good habits, for the journey, and to employ horses which are steady, and not vicious, or likely to endanger the safety of the passenger.⁶ In the pithy language of an eminent judge, it may be said that ‘the coachman must have competent skill; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. If there is the least failure in any of those things, the duty of the coach proprietors is not fulfilled, and they are responsible for any injury or damage that happens.’⁷

“In the next place, they are bound not to overload the coach, either with passengers or with luggage; and they are to take care that the weight is suitably adjusted, so that the coach is not top-heavy and made liable to upset.⁸

¹ Story on Bail. (4th ed.), §§ 592-594, 598, 600-602.

² Citing *Bremner v. Williams*, 1 Car. & P. 414; *Crofts v. Waterhouse*, 3 Bing. 321; *Jones v. Boyce*, 1 Stark. 493; *Christie v. Griggs*, 2 Camp. 80; 1 Bell's Comm. (5th ed.) 462; *Sharp v. Grey*, 9 Bing. 457; *Camden etc. R. Co. v. Burke*, 13 Wend. 611, 627, 628.

³ Citing *Aston v. Heaven*, 2 Esp. 533; 1 Bell's Comm. (5th ed.) 462, 463; *Sharp v. Grey*, 9 Bing. 457; *Camden etc. R. Co. v. Burke*, 13 Wend. 611, 627, 628.

⁴ Citing *Sharp v. Grey*, 9 Bing. 457; *Christie v. Griggs*, 2 Camp. 80.

⁵ Citing *Sharp v. Grey*, 9 Bing. 457; *Dig., Lib. 19, tit. 2, l. 19, § 1*; *Pothier's Pand., Lib. 19, tit. 2, note 63*; *Christie v. Griggs*, 2 Camp.

80; *Camden etc. R. Co. v. Burke*, 13 Wend. 611, 627; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, 19 Wend. 251.

⁶ Citing *Waland v. Elkins*, 1 Stark. 272; *Christie v. Griggs*, 2 Camp. 79; *Harris v. Costar*, 1 Car. & P. 636; *Crofts v. Waterhouse*, 3 Bing. 321; *Stokes v. Saltonstall*, 13 Pet. 181; *Hall v. Connecticut Steamboat Co.*, 13 Conn. 319.

⁷ *Per Best, C. J.*, in *Crofts v. Waterhouse*, 3 Bing. 314, 321; 1 Bell's Comm. (5th ed.) 462.

⁸ Citing *Long v. Horne*, 1 Car. & P. 612; *Israel v. Clarke*, 4 Esp. 259; *Aston v. Heaven*, 2 Esp. 533; *Heard v. Mountain*, 5 Petersd. Abr. tit. “Carriers,” § 54; 1 Bell's Comm. (5th ed.) 462.

The Law as laid down by Mr. Justice Story.

"They are bound to make use of all the ordinary precautions for the safety of passengers on the road.¹ This involves a consideration of the duties of the coachman in driving on the road. If he is guilty of any rashness, negligence, or misconduct, or if he is unskilful, or deviates from the acknowledged custom of the road, the proprietors will be responsible for any injury resulting from his acts.² Thus, if the coachman drives with reins so loose that he cannot govern his horses, the proprietors of the coach will be answerable.³ So, if there is danger in any part of the road, or in a particular passage, and he omits to give due warning to the passengers.⁴ So, if he takes the wrong side of the road, and an accident happens from want of proper room.⁵ So, if by any incaution he comes in collision with another carriage.⁶ So, if any accident happens from his racing against other coaches; or from his driving so rapidly over the common road as amounts to rashness; or, *à fortiori*, from his driving immoderately over a dark and dangerous road; or from his taking too many passengers for the size and strength of his coach.⁷ In short, he must in all cases exercise a sound and reasonable discretion, in travelling on the road, to avoid dangers and difficulties; and if he omits it, his principals are liable.⁸ The liability of the coach proprietors will be the same, although the injury to the passenger is caused by his own act, — as, by leaping from the coach, — if there is real danger, and it arises from the want of due skill or from the careless conduct of the coachman.⁹ And it will not make any difference in the case, that, by such attempt to escape, the passenger has increased the peril, or even occasioned the coach to upset, and has thereby caused the injury to himself, if the want of proper skill or care in the coachman has placed the passengers in a state of peril, and there was reasonable ground for supposing that the coach would thereby be upset.¹⁰

"In all cases, the coach proprietors are bound to carry the passengers to the end of the journey, and to put them down at the usual place of stopping; and if that is an inn-yard, it is not sufficient to put them down on the outside of the gateway of the inn.¹¹ If they agree to take a passenger to a particular place, this also becomes obligatory on them.¹² If the custom of the coach is to carry the passengers to their own houses or lodgings in a particular place, that must be conformed to.

"Next, as to the liability of passenger-carriers. This naturally flows from their duties. As they are not, like common carriers of goods, insurers against all injuries except by the act of God or by public enemies, the inquiry is natu-

¹ Citing 1 Bell's Comm. (5th ed.) 462.

² Citing Stokes v. Saltonstall, 13 Pet. 181; 2 Kent's Comm. (4th ed.) 601, 602; Hall v. Connecticut Steamboat Co., 13 Conn. 319.

³ Citing Aston v. Heaven, 2 Esp. 533; Stokes v. Saltonstall, 13 Pet. 181, 191, 192.

⁴ Citing Dudley v. Smith, 1 Camp. 167; 1 Bell's Comm. (5th ed.) 463 and notes.

⁵ Citing Wordsworth v. Willan, 5 Esp. 273; Waland v. Elkins, 1 Stark. 272.

⁶ Citing Mayhew v. Boyce, 1 Stark. 423; Dudley v. Smith, 1 Camp. 167; 1 Bell's Comm. (5th ed.) 462 and note.

⁷ Citing 1 Bell's Comm. (5th ed.) 462, 463,

and notes; Israel v. Clarke, 4 Esp. 259; Stokes v. Saltonstall, 13 Pet. 181.

⁸ Citing Jackson v. Tollett, 2 Stark. 37; Stokes v. Saltonstall, 13 Pet. 181, 192, 193; 2 Kent's Comm. (4th ed.) 601, 602; 1 Bell's Comm. (5th ed.) 462; Hall v. Connecticut Steamboat Co., 13 Conn. 319.

⁹ Citing Jones v. Boyce, 1 Stark. 493; Crofts v. Waterhouse, 3 Bing. 321; Stokes v. Saltonstall, 13 Pet. 181, 191.

¹⁰ Citing Stokes v. Saltonstall, 13 Pet. 181, 191, 192.

¹¹ Citing Dudley v. Smith, 1 Camp. 167.

¹² Citing Ker v. Mountain, 1 Esp. 27.

Notes.

rally presented, what is the nature and extent of their responsibility?¹ It is certain that this undertaking is not an undertaking absolutely to convey safely. But although they do not warrant the safety of the passengers at all events, yet their undertaking and liability go to this extent, that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty.² But in what manner are we to measure this due care and diligence? Is it ordinary care and diligence, which will make them liable only for ordinary neglect? Or is it extraordinary care and diligence, which will render them liable for slight neglect? As they undertake for the carriage of human beings, whose lives and limbs and health are of great importance as well to the public as to themselves, the ordinary principle in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem to furnish the true analogy and rule. It has been accordingly held that passenger-carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go,—that is, for the utmost care and diligence of very cautious persons; and of course they are responsible for any, even the slightest, neglect.³

“But passenger-carriers, not being insurers, are not responsible for accidents where all reasonable skill and diligence have been employed. When every thing has been done which human prudence, care, and foresight can suggest, accidents may happen. The lights may in a dark night be obscured by fog; the horses may be frightened; the coachman may be deceived by the sudden alteration of objects on the road; the coach may be upset accidentally by striking another vehicle or by meeting with an unexpected obstruction; or from the intense severity of the cold, the coachman, although possessed of all proper skill, and taking all due and reasonable care, may at the time become physically incapable of managing his horses or of otherwise doing his duty.⁴ In all these and the like cases, if there is no negligence whatsoever, the coach proprietors are exonerated.”⁵

The language employed in these sections is traceable in many subsequent judicial opinions,⁶ and in two cases they have been quoted at length as embodying the law on the subject.⁷

§ 22. Duty to furnish Competent Drivers.—If, with this measure of duty imposed upon him by law, a driver gets sick so as to be unable to proceed on a journey, an exigency has arrived which it was the duty of the proprietor to

¹ Citing *Stokes v. Saltonstall*, 13 Pet. 181, 191; *Sharp v. Grey*, 9 Bing. 457.

² Citing *Harris v. Costar*, 1 Car. & P. 636; *Crofts v. Waterhouse*, 3 Bing. 321; *Stokes v. Saltonstall*, 13 Pet. 181, 191.

⁴ Citing *Aston v. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Camp. 79; *White v. Boulton, Peake*, 113; 1 Bell's Comm. (5th ed.) 562; *Stokes v. Saltonstall*, 13 Pet. 181, 191-193. This whole subject was thoroughly examined by the Supreme Court of the United States, in the case of *Stokes v. Saltonstall*; and the opinion of the court, de-

livered by Mr. Justice Barbour, will be found to embrace and to exhaust the learning applicable to it. See also *Camden etc. R. Co. v. Burke*, 13 Wend. 611, 627, 628.

⁴ Citing *Stokes v. Saltonstall*, 13 Pet. 181, 191-193.

⁵ Citing *Crofts v. Waterhouse*, 3 Bing. 319, 321; *Christie v. Griggs*, 2 Camp. 79; *Aston v. Heaven*, 2 Esp. 533.

⁶ *Maury v. Talmadge*, 2 McLean, 157; *Peck v. Neil*, 3 McLean, 22.

⁷ *Farish v. Reigle*, 11 Gratt. 697, 707; *Fairchild v. California Stage Co.*, 13 Cal. 599.

Duty to furnish Competent Driver.

foresee and provide for. He is bound to have another competent driver ready to take the place of the one who is sick; and if the stage is intrusted to an incompetent person, either by himself, his local agent, or by the driver who has been taken sick, and in consequence of the incompetency of this person the stage is overturned and a passenger injured, he will be liable in damages. It was so held in a case in Illinois,¹ the facts of which, and the law arising upon them, are well blended together in the following paragraph in the opinion of the court, delivered by WALKER, J.: "It is likewise insisted that as Ward, who was also a passenger, was at the time the accident occurred acting as the driver, the proprietors are therefore not responsible for the injury sustained by defendant in error. It was the duty of the proprietors of the stage line to furnish competent and careful drivers, and any neglect of that duty must render them liable for injuries sustained by passengers by reason of its omission. When Ward was permitted to drive the coach, to relieve the regularly employed driver that had been put in charge of the coach, he for the time being became their driver; and whether he undertook to drive at the request of the proprietors, their agents, or of the regular driver on the line, can make no difference. The driver was unwell when he left his station, and should have been relieved by the substitution of another competent driver able to perform the duty. The proprietors, by themselves or their agents, have control of the horses and coaches, and when any one else is permitted to assume their control, such person is, for all purposes of a driver, their agent; and if incompetent, unskilful, or careless, and injury results, the proprietors are liable for the damages to the same extent as if he were their regularly employed driver. They must also furnish drivers who are familiar with the road over which they have to pass, so that they may avoid the changes incident to its travel. In this case it is apparent that if Ward had known the road, the accident would not have occurred. The evidence shows that instead of passing upon the centre of the road at the place where the accident occurred, that the drivers on this line had been in the habit of travelling along and in the ditch at the side of the road. The horses being accustomed to that side of the road, were constantly making efforts to get into it, while Ward was endeavoring to keep them in the centre of the road. It was this effort of the horses to get into the side track which carried the wheels of the coach over the bank of the ditch and overturned it, which occasioned the injury of defendant in error. Had Ward been even as well acquainted with the road as were the horses, the accident would not have happened. This was one of the perils of the road that could not have occurred with a driver familiar to it, exercising ordinary prudence and care. And the plaintiffs in error having failed to furnish such a driver, must be held liable to make compensation for damages resulting from that neglect of duty."²

If a stage proprietor furnishes a known drunkard for a driver, through whose negligence, while intoxicated, a passenger receives an injury, it is a proper case for exemplary damages.³

§ 23. *Care and Vigilance exacted of the Driver.* — Where it is open to the driver to adopt one of two courses, one of which is *safe* and the other is *hazardous*, and he adopts the latter, and an accident ensues and a passenger is injured,

¹ Tuller v. Talbot, 23 Ill. 357.² *Id.* 362.³ Sawyer v. Sauer, 10 Kan. 466.

Notes.

the proprietor must pay damages.¹ In another case, where the driver of a stage-coach ascending a hill saw coming towards him a tilted wagon and another stage-coach, and turning to avoid them his coach came upon a bank of earth, by which it was overturned, the question was put by Lord ELLENBOROUGH to the jury whether he might have exercised a better discretion in stopping. "In order to subject the master to damages," said he, "it must appear that there has been something to blame on the part of his servant, and he is blamable if he has not exercised the best and soundest judgment on the subject; if he could have exercised a better judgment than he did, the owner is liable."²

This seems a severe rule, but it is in accordance with the general current of authority in this country,³ and closely resembles what was said to the jury by Judge LEAVITT in a case tried in the United States Circuit Court for Ohio in 1840: "The jury will observe that the law holds a driver to the observance of the strictest care and the most unremitting vigilance. And, however unexceptionable may be his general character as a driver, if in a particular instance he is guilty of carelessness or negligence, whereby an injury occurs to a passenger, his employer, whose agent he is, is accountable. If, therefore, the jury should come to the conclusion, after a deliberate examination of the testimony, that the coach, owing to the excessive weight put upon it, was unmanageable, in the circumstances in which it was placed, by any power or skill which could be applied or used by the driver, and was therefore upset; or if they should believe that the driver, even from a temporary inattention or neglect, permitted the coach to get into a predicament from which an upset was the inevitable result; or if they believe that the disaster in the present case is referable to these two causes combined, they will find for the plaintiff. If, on the other hand, from an attentive consideration of the facts of the case as exhibited by the evidence, the jury should be of opinion that the accident in question is not imputable to any impropriety of conduct on the part of the defendant's agent in loading the stage, or to any negligence or carelessness on the part of the driver, but was, as contended for by the defendant's counsel, the result of mere accident or misfortune which no human foresight, care, or attention could have prevented, the defendant cannot be held legally answerable."⁴

Moreover, where the driver of a coach approaches a place of peculiar danger to passengers, he is bound to warn them of the nature of the danger, to the end that they may choose whether they will run the risk of it or not. Thus, where the stage reached the gateway of the inn where it was to stop, and the driver requested the plaintiff, a woman, who was riding on the outside, to alight there, and she replied that as the road was dirty she would rather be driven into the yard, and he told her that the passage into the yard was *very awkward*, advised her to stoop, and then drove on, and it appeared that the passage led under an archway which was but a foot higher than the top of the stage, by which she was struck and greatly injured, it was held a case for damages against the stage-owner. If the driver had said to her, "The others will be safe in proceeding. but you must go down here, as you cannot remain upon the coach without danger to your life," she could only have blamed her own imprudence for what

¹ *Mayhew v. Boyce*, 1 Stark. 423.

² *Supra*, § 4, subsect. 3.

³ *Jackson v. Tollett*, 2 Stark. 37. See also *Curtis v. Drinkwater*, 2 Barn. & Adol. 163.

⁴ *Maury v. Talmadge*, 2 McLean, 157, 166.

 Care and Vigilance of the Driver.

followed; but he should have given her the means to judge, if he was to leave her to make her election."¹

Further, the proprietor of a stage-coach is answerable for the negligence of the driver from the usual place of taking up the passengers, not only till the coach arrives at its place of destination, but until the passengers are there safely set down. This doctrine is stated and enforced by Lord ELLENBOROUGH in the case last cited.²

Although the agent of a stage-owner requests a passenger to take an inside seat, and tells him that he will ride on the outside at his peril, and the passenger disobeys the injunction, this will not excuse the negligence of the driver in injuring him. The passenger, in such a case, assumes the peculiar risks of his exposed situation, but not the risks resulting from the negligence of the driver; and whether his disobeying the injunction contributed to the injury, is a question for the jury.³ Whether the vehicle was overturned by the negligence of the driver, will be a question of fact for the jury, under all the circumstances of the case.⁴ "It is impossible to lay down any general rule by which the inquiry whether a coach is excessively laden can be satisfactorily tested. The character and condition of the road over which a vehicle is to pass will be the main consideration in such an inquiry. It will be obvious to the jury that upon a properly graded and well finished turnpike there will be no great danger of the upsetting of a carriage from any weight that may be put on it, while upon one of the common roads of the country, especially over a hilly region, there might be very great danger in conveying a weight which, under other circumstances, could not be regarded as excessive. It will therefore be the duty of the jury, in coming to a conclusion on this point, to take into consideration the number of passengers, the weight of baggage, the general character of the road along which the defendant's stages run, and especially the portion of it over which the coach was passing when this accident occurred; and if the jury believe it can be fairly referred to the improper loading of the coach, there can be no question but what the defendant is legally answerable for the consequences. It is clearly the duty of a stage-proprietor to see that the safety of his passengers is not put at hazard by an excessive load; and if he disregards or violates his duty in this respect, he is liable for any injury that may follow."⁵ In an action for an injury to the passenger, alleged to have been occasioned by overturning the stage, it has been held incompetent to prove that it was the custom *on that route* to carry as great a number of passengers as were in and on the stage at that time. The defendant cannot thus give in evidence, either in his own justification or in extenuation of damages, a custom or practice established by himself. But a general custom as to the number of passengers which can be carried with safety must in all cases vary with the character and condition of the road. It has been held competent to ask of drivers acquainted with the particular route

¹ Dudley v. Smith, 1 Camp. 167.

² Dudley v. Smith, *supra*. Accordingly, in case of railway carriers, if the passenger is assaulted and injured by the company's servant while going off the car at the place of his destination, the company must pay damages, unless the act of the servant was wilful or outside the scope of his employment.

Houston etc. R. Co. v. Gorbett, 49 Texas, 573. See *post*, Chap. X.

³ Keith v. Pinkham, 43 Me. 501.

⁴ Leavitt, J., to the jury in Maury v. Talmadge, 2 McLean, 157, 165.

⁵ Per Leavitt, J., in Maury v. Talmadge, 2 McLean, 157, 165.

Notes.

what number of passengers could be safely carried by a coach such as that in which the plaintiff was, in the state in which the road was at the time of the injury.¹

§ 24. **Overloading the Vehicle.**—If the carrier loads his vehicle with more passengers than its strength will reasonably warrant, although he has no more persons upon it than the statute allows, and it breaks down, he must pay damages to a passenger injured.² The case is still worse where he overloads the coach with passengers, and in addition to this, places a mass of heavy freight on top. "It is no apology," said the Supreme Court of Connecticut in a case of this kind, "that freight is put upon these stages, as in this case, under public or any other notice. The liability continues the same. Nor is it any apology that the stage proprietors and their drivers are accustomed to load down their stages with passengers and freight, notwithstanding the state of the roads, until nothing more can be crowded within or accumulated on top. It is high time that the law on this subject should be better understood and regarded, and that such unbearable liberties should cease to be taken by persons who stipulate to carry passengers safely and without exposure. Converting stage-coaches into wagons to transport iron, and wellnigh every thing else, is the last innovation upon the rights of the travelling community, and it is one which we do not intend to sanction or countenance." In the case in which this lecture was delivered from the bench, it appeared that a stage-sleigh had been loaded with thirteen passengers, with their baggage, and also with four hundred and eighteen pounds of iron, placed on top of the cover. On turning a slippery and dangerous place, the sleigh was upset and the plaintiff injured. The jury having returned a verdict for the defendant, the Supreme Court set it aside as against the weight of evidence, and granted a new trial.³

¹ Maury v. Talmadge, 2 McLean, 157, 158.

³ Derwort v. Loomer, 21 Conn. 245.

² Israel v. Clark, 4 Esp. 259.

CHAPTER VI.

CONTRIBUTORY NEGLIGENCE OF THE PASSENGER.

- LEADING CASES: 1. *Morrissey v. Wiggins Ferry Company*.—The general doctrine of contributory negligence applied to injuries to passengers.
2. *Jones v. Boyce*.—Passenger acting erroneously under impulse of fear.
3. *Railroad Company v. Jones*.—Passenger riding in an unauthorized place.
4. *Railroad Company v. Aspell*.—Passenger leaping from train while in motion.

- NOTES: § 1. General doctrines.
2. Riding in an unauthorized manner.
- (1.) Arm out of window.
- (2.) Upon the car platform.
- (3.) In the baggage-car.
- (4.) In various positions.
3. Leaping on or off cars in motion.
4. Getting on and off train at a dangerous place.
5. Passenger laboring under a disability.
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1. THE GENERAL DOCTRINES OF CONTRIBUTORY NEGLIGENCE APPLIED TO INJURIES TO PASSENGERS.

MORRISSEY *v.* WIGGINS FERRY COMPANY.*

Supreme Court of Missouri, 1869.

Hon. DAVID WAGNER,	} <i>Judges.</i>
“ PHILEMON BLISS,	
“ WARREN CURRIER,	

1. **Contributory Negligence—Recovery where Passenger is in Fault.**—The doctrine of some of the courts, that there can be no recovery for negligence where the person injured is in the least fault, denied.
2. **On the contrary**, the correct rule is held to be, that although the passenger's misconduct may have contributed remotely to the injury, yet if the carrier's misconduct was the immediate cause of it, and if by the exercise of prudence he could have prevented it, he is not excused; and it ought to be left to the jury to say whether (notwithstanding the imprudence of the passenger) the carrier could not, by the exercise of reasonable diligence, have prevented the catastrophe.
3. **The degree of responsibility** to which carriers of passengers are subjected is not ordinary care merely, which will make them liable only for ordinary neglect, but extraordinary care, which renders them liable for slight neglect.

Morrissey v. Wiggins Ferry Company.

APPEAL from the St. Louis Circuit Court.

The facts are stated in the opinion of the court.

On the trial, the following, among other instructions, were given to the jury for the defendant:—

1. The jury are instructed that they are to consider whether or not there was any negligence on the part of the deceased, or a want of care and common prudence ordinarily exercised on such occasions and in like circumstances. And if they believe from the evidence that there was such negligence or want of care and prudence on her part, which produced, or contributed to produce, the accident and death of said deceased (if they believe she was drowned), then they will find for the defendant.

2. Unless the jury believe from the evidence that said Annie Morrissey went overboard and was drowned, and that she was then a minor under the age of eighteen years, and the daughter of plaintiff, and that such accident and death were occasioned by the negligence, unskilfulness, or criminal intent of the engineer, agents, or employees of the defendant, while running, conducting, or managing the ferry-boat, as respects the keeping of the entrance to said boat, where passengers go on and off, properly guarded and protected, and as respects keeping lights on said boat and wharf-boat, and unless they further believe that such accident and death resulted without any negligence or want of care on her part which produced, or contributed to produce, such accident and death, they will find for defendant.

Morris & Peabody, for appellant; *Ewing & Holliday*, for respondent.

WAGNER, J., delivered the opinion of the court.—This action was brought under the second section of chap. 147 of the General Statutes, and damages claimed to the amount of \$5,000, by the plaintiff, as the only surviving parent of Annie Morrissey, who, it is alleged, was a minor and unmarried, and was drowned while crossing the Mississippi River on one of the defendant's ferry-boats, in consequence of the negligence, unskilfulness, or criminal intent of defendant's agents and employees in managing said boat.

On the trial in the court below, under certain instructions, the jury found a verdict for the defendant. There was much evidence given, and it was conflicting in its character; but I shall neither detail nor comment on it, as it belongs exclusively to the jury to attach to it whatever weight and consideration they may deem it deserves.

The whole defence was based upon the ground of contributory negligence; that the deceased, through her imprudence and want of care, produced or contributed to the accident in such a manner as ought to preclude a recovery. * That there is a difference in the adjudications

Supreme Court of Missouri.

upon this subject, and that some courts have held that no recovery can be had where the injured party is in the least in fault, cannot be disputed. But such is not the ruling of this court; and it is to be observed that the courts which have heretofore laid down the above doctrine are rapidly retracing their steps, and declaring a rule more reasonable and in consonance with justice.

The question has been discussed in several recent cases in this court, and the law must be considered as established, — no longer in doubt or open to question. The settled principle now is that it ought to be left to the jury to say whether, notwithstanding the imprudence of the injured person, the defendant could not, in the exercise of reasonable diligence, have prevented the catastrophe.

The degree of responsibility to which carriers of passengers are subjected is not ordinary care merely, which will make them liable only for ordinary neglect, but extraordinary care, which renders them liable for slight neglect.

In a recent case in this court, in discussing the liability of passenger-carriers, we declared the rule to be "that the carrier shall be guilty of some negligence which mediately or immediately produced or enhanced the injury, and that passengers should not have been guilty of any carelessness and imprudence which directly contributed to the injury, since no one can recover for an injury of which his own negligence was, in whole or in part, the proximate cause; and that, although the plaintiff's misconduct may have contributed remotely to the injury, if the defendant's misconduct was the immediate cause of it, and with the exercise of prudence he might have prevented it, he is not excused."¹ The concluding paragraph of defendant's second instruction is objectionable. It tells the jury that unless they believe that the accident and death resulted without any negligence or want of care on the part of Annie, which produced, or contributed to produce, such accident and death, then they should find for the defendant.

This was in direct conflict with the law as above declared. It destroyed the plaintiff's right of action for the least fault on the part of deceased, and exonerated the defendant although the unskillfulness, negligence, and criminal intent of its agents and employees may have directly caused the injury. Such is not the law, and we hope it never will be.

The plaintiff asked two instructions, which were refused. They are as follows: —

"That if the jury find from the evidence that the employees of

¹ *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Boland v. Missouri R. Co.*, 36 Mo. 484; *Meyer v. Pacific R. R.*, 40 Mo. 153; *Liddy v. St. Louis R. Co.*, 40 Mo. 506.

 Jones v. Boyce.

defendant, or either of them, were guilty of negligence in not keeping the entrance to defendant's boat properly guarded or protected, or in not keeping sufficient lights on said boat, or on the wharf-boat, by reason of which deceased came to her death, and that deceased was not guilty of any want of ordinary care and prudence which directly contributed to the injury, then the defendant is liable in this suit.

"That although the deceased may have been guilty of misconduct, or failed to exercise ordinary care or prudence while a passenger on defendant's boat, which may have contributed remotely to the death of deceased, yet if the employees, or either of them, of the defendant were guilty of negligence which was the immediate cause of the death, and with the exercise of prudence by said employees, or either of them, said injury and death might have been prevented, the defendant is liable in this suit."

The instructions asserted correct propositions of law, and should have been given. They tell the jury that if the deceased only remotely contributed to the accident, and if the agents and employees of the defendant were the direct and immediate cause, and might have prevented it by the exercise of prudence and care, the defendant is liable. Nothing can be clearer. [Unimportant point omitted.]

With the concurrence of the other judges, the judgment will be reversed and the cause remanded.

Judgment reversed.

2. PASSENGER ACTING ERRONEOUSLY UNDER IMPULSE OF FEAR.

JONES v. BOYCE.*

English Court of King's Bench, 1816.

Before Lord ELLENBOROUGH, *Chief Justice*, at Nisi Prius.

Passenger Leaping from Stage-coach.—If, through the default of a coach proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned.

THIS was an action on the case against the defendant, a coach proprietor, for so negligently conducting the coach that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken.

It appears that soon after the coach had set off from an inn, the coup-

* Reported, 1 Stark. 493.

Lord Ellenborough at Nisi Prius.

ling-rein broke, and one of the leaders being ungovernable whilst the coach was on a descent, the coachman drew the coach to one side of the road, where it came in contact with some piles, one of which it broke, and afterwards the wheel was stopped by a post. Evidence was adduced to show that the coupling-rein was defective, and that the breaking of the rein had rendered it necessary for the coachman to drive to the side of the road in order to stop the career of the horses. Some of the witnesses stated that the wheel was forced against the post with great violence; and one of the witnesses stated that at that time the plaintiff, who had before been seated at the back part of the coach, was jerked forward in consequence of the concussion, and that one of the wheels was elevated to the height of eighteen or twenty inches; but whether the plaintiff jumped off or was jerked off he could not say. A witness also said: "I should have jumped down had I been in his [the plaintiff's] place, as the best means of avoiding the danger." The coach was not overturned, but the plaintiff was immediately afterwards seen lying on the road with his leg broken, the bone having been protruded through the boot.

Upon this evidence, Lord ELLENBOROUGH was of opinion that there was a case to go to the jury, and a considerable mass of evidence was then adduced tending to show that there was no necessity for the plaintiff to jump off.

LORD ELLENBOROUGH, in his address to the jury, said: This case presents two questions for your consideration: First, whether the proprietor of the coach was guilty of any default in omitting to provide the safe and proper means of conveyance; and if you should be of that opinion, the second question for your consideration will be whether that default was conducive to the injury which the plaintiff has sustained; for, if it was not so far conducive as to create such a reasonable degree of alarm and apprehension in the mind of the plaintiff as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action is not maintainable. To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril. If that position was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The question is whether he was placed in such a situation as to render what he did a prudent precaution for the purpose

Railroad Company v. Jones.

of self-preservation. His lordship, after recapitulating the facts, and commenting upon them, and particularly on the circumstance of the rein being defective, added: If the defect in the rein was not the constituent cause of the injury, the plaintiff will not be entitled to your verdict; therefore, it is for your consideration whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences. If, therefore, you should be of opinion that the reins were defective, did this circumstance create a necessity for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril? If you are of that opinion, then, since the original fault was in the proprietor, he is liable to the plaintiff for the injury which his misconduct has occasioned. This is the first case of the kind which I recollect to have occurred. A coach proprietor certainly is not to be responsible for the rashness and imprudence of a passenger; it must appear that there existed a reasonable cause for alarm.

The jury found a verdict for the plaintiff. Damages, £300.

Garrow, A. G., and *V. Lawes*, for the plaintiff; *Topping*, *Scarlett*, and *Espinasse*, for the defendant.

3. PASSENGER RIDING IN AN UNAUTHORIZED POSITION.

RAILROAD COMPANY v. JONES.*

*Supreme Court of the United States, 1877.*HON. MORRISON R. WAITE, *Chief Justice.*

" NATHAN CLIFFORD,	} <i>Justices.</i>
" SAMUEL F. MILLER,	
" WILLIAM STRONG,	
" WARD HUNT,	
" NOAH H. SWAYNE,	
" STEPHEN J. FIELD,	
" JOSEPH P. BRADLEY,	
" JOHN M. HARLAN,	

Case in Judgment.—The plaintiff, a laborer in the employ of a railway company, when about to leave the place where he was working, on one of the defendant's trains, was told by the person superintending him, who was also conductor of the train, to get on anywhere, as the train was in a hurry to leave. The plaintiff got on the pilot of the

* Reported, 95 U. S. 439.

Supreme Court of the United States.

locomotive, which was a dangerous place to ride. While on the trip, he was injured by a collision between the locomotive and some other cars of the company, caused by the negligence of the company. The proper place for him to ride was in a box-car on the train, provided for the employees; and he had been told previously always to ride there, and had been forbidden riding on the pilot of the locomotive. No one of those in the box-car was injured, and he would not have been if he had ridden there. *Held*, that the plaintiff was guilty of contributory negligence, and could not recover of the defendant for the injury.

In error to the Supreme Court of the District of Columbia.

Enoch Trotter, for plaintiff in error; *Edward C. Carrington* and *Campbell Carrington*, *contra*.

Mr. Justice SWAYNE delivered the opinion of the court. — The defendant in error was the plaintiff in the court below. Upon the trial there he gave evidence to the following effect: For several months prior to the 12th of November, 1872, he was in the service of the company as a day-laborer. He was one of the party of men employed in constructing and keeping in repair the roadway of the defendant. It was usual for the defendant to convey them to and from their place of work. Sometimes a car was used for this purpose; at others, only a locomotive and tender were provided. It was common, whether a car was provided or not, for some of the men to ride on the pilot or bumper in front of the locomotive. This was done with the approval of Van Ness, who was in charge of the laborers when at work, and the conductor of the train which carried them both ways. The plaintiff had no connection with the train. On the 12th of November before mentioned, the party of laborers, including the plaintiff, under the direction of Van Ness, were employed on the west side of the eastern branch of the Potomac, near where the defendant's road crosses that stream, in filling flat-cars with dirt and unloading them at an adjacent point. The train that evening consisted of a locomotive, tender, and box-car. When the party was about to leave on their return that evening, the plaintiff was told by Van Ness to jump on anywhere—that they were behind time and must hurry. The plaintiff was riding on the pilot of the locomotive, and while there the train ran into certain cars belonging to the defendant and loaded with ties. These cars had become detached from another train of cars, and were standing on the track in the Virginia Avenue tunnel. The accident was the result of negligence on the part of the defendant. Thereby one of the plaintiff's legs was severed from his body, and the other one severely injured. Nobody else was hurt, except two other persons, — one riding on the pilot with the plaintiff, and the other one on the cars standing in the tunnel.

The defendant then gave evidence tending to prove as follows: About six weeks or two months before the accident, a box-car had been assigned

Railroad Company v. Jones.

to the construction-train with which the plaintiff was employed. The car was used thereafter every day. About the time it was first used, and on several occasions before the accident, Van Ness notified the laborers that they must ride in the car, and not on the engine; and the plaintiff in particular, on several occasions not long before the disaster, was forbidden to ride on the pilot both by Van Ness and the engineer in charge of the locomotive. The plaintiff was on the pilot at the time of the accident without the knowledge of any agent of the defendant. There was plenty of room for the plaintiff in the box-car, which was open. If he had been anywhere but on the pilot, he would not have been injured. The collision was not brought about by any negligence of the defendant's agents, but was unavoidable. The defendant's agents in charge of the two trains, and the watchman in the tunnel, were competent men.

The plaintiff, in rebuttal, gave evidence tending to show that sometimes the box-car was locked when there was no other car attached to the train, and that the men were allowed by the conductor and engineer to ride on the engine, and that on the evening of the accident the engineer in charge of the locomotive knew that the plaintiff was on the pilot.

The evidence being closed, the defendant's counsel asked the court to instruct the jury as follows: "If the jury find from the evidence that the plaintiff knew the box-car was the proper place for him, and if he knew his position on the pilot of the engine was a dangerous one, then they will render a verdict for the defendant, whether they find that its agents allowed the plaintiff to ride on the pilot or not." This instruction was refused, and the defendant's counsel excepted.

Three questions arise upon the record: 1. The exception touching the admission of evidence. 2. As to the application of the rule relative to injuries received by one servant by reason of the negligence of another servant, both being at the time engaged in the same service of a common superior. 3. As to the contributory negligence on the part of the plaintiff.

We pass by the first two without remark. We have not found it necessary to consider them. In our view, the point presented by the third is sufficient to dispose of the case.

Negligence is failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the

Supreme Court of the United States.

occasion.¹ One who by negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is, (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part, the misfortune would not have happened. In the former case, the plaintiff is entitled to recover; in the latter, he is not.²

It remains to apply these tests to the case before us. The facts with respect to the cars left in the tunnel are not fully disclosed in the record. It is not shown when they were left there, how long they had been there, when it was intended to remove them, nor why they had not been removed before. It does appear that there was a watchman at the tunnel, and that he and the conductor of the train from which they were left, and the conductor of the train which carried the plaintiff, were all well selected and competent for their places. For the purposes of this case, we assume that the defendant was guilty of negligence.

The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have gone into the box-car in as little, if not less time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, although bound to a high degree of care, did not insure his safety. He was not an infant, nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box-car, where

¹ See Whart. on Neg., § 1, and notes.

² *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Grand Junction R. Co.*, 3 Mee. & W. 244;

Davies v. Mann, 10 Mee. & W. 546; *Clayards v. Dethick*, 12 Q. B. 439; *Van Lien v. Scoville Co.*, 14 Abb. Pr. (N. S.) 74; *Ince v. East Boston Co.*, 106 Mass. 149.

Railroad Company v. Aspell.

he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as any thing short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down.¹

The plaintiff was not entitled to recover. It follows that the court erred in refusing the instructions asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such directions, and error to refuse.²

Judgment reversed, and the cause remanded with directions to issue a venire ne novo, and to proceed in conformity with this opinion.

4. PASSENGER LEAPING FROM TRAIN WHILE IN MOTION.

RAILROAD COMPANY v. ASPELL.*

*Supreme Court of Pennsylvania, 1854.*HON. JEREMIAH S. BLACK, *Chief Justice.*

“ ELLIS LEWIS,	} <i>Justices.</i>
“ WALTER H. LOWRIE,	
“ GEORGE W. WOODWARD,	
“ JOHN C. KNOX,	

If a passenger-train, instead of stopping at the station where a passenger is to get off, passes by it, though at a diminished rate of speed, and the passenger, against the warning of the conductor, leaps from the train while in motion, and is injured, he cannot recover damages of the company; and this is so, although the conductor calls out the name of the station before it is reached.

ERROR to the Common Pleas of Delaware County.

This was an action on the case by Richard Aspell against the Pennsylvania Railroad Company.

It was alleged in the declaration that the plaintiff became a passenger

* Reported, 23 Pa. St. 147.

¹ Hickey v. Railroad Co., 14 Allen, 429; Todd v. Railroad Co., 3 Allen, 18; s. c. 7 Allen, 207; Gavett v. Railroad Co., 16 Gray, 501; Lucas v. Railroad Co., 6 Gray, 64; Ward v. Railroad Co., 2 Abb. Fr. (N. s.) 411; Galena

etc. R. Co. v. Yarwood, 15 Ill. 468; Doggett v. Railroad Co., 34 Iowa, 285.

² Gavett v. Railroad Co., *supra*; Merchants' Bank v. State Bank, 10 Wall. 605; Pleasants v. Fant, 22 Wall. 121.

Supreme Court of Pennsylvania.

in the cars of the Pennsylvania Railroad Company from Philadelphia to Morgan's Corner; that the car was not stopped at the latter place, so as to allow him to alight safely; that in attempting to alight, he was, by reason of the rapid motion of the cars, thrown upon the ground and one of his feet injured.

The plea was, not guilty. Verdict for the plaintiff for \$1,500.

The plaintiff took passage from Philadelphia for Morgan's Corner in March, 1851, in the night line. Just before reaching the latter place, the State agent endeavored to give the usual signal to the engineer to stop, by pulling the bell-rope. The rope did not operate, though the speed of the train was checked by the engineer in order more safely to pass certain switches. The speed of the train increasing, other signals were made to the engineer to stop; but whilst the train was in motion the plaintiff leaped from the car, though warned by the conductor and brakeman not to do so, and informed that the train would be stopped and backed to the station. The plaintiff's foot was injured.

The court below charged that the pulling the bell-rope, and the announcement of Morgan's Corner, warned the plaintiff that he had arrived there, and was expected to prepare for leaving; that though he was warned not to jump, he could nevertheless recover for the injury received; that the agents of the company, in announcing to the passengers the place of arrival while the cars were in motion at the rate of from seven to ten miles an hour, did not exercise the degree of diligence and care which the law required; that the train should have been stopped before such announcement as to the place was made.

It was further charged that in this case a contract existed, and the train should have been stopped; that the announcement of Morgan's Corner caused the plaintiff, in going to the platform, to be in a position of danger, and although it was imprudent in the plaintiff to jump from the car, though warned of the danger, yet the agents of the company being in fault, the plaintiff could recover.

It was further charged that the imprudence of the plaintiff might be considered by the jury in fixing the damages.

The portions of the charge referred to were assigned for error.

W. Darling'on, for plaintiff in error; *Lewis*, for defendant in error.

The opinion of the court was delivered by—

BLACK, C. J. — The plaintiff below was a passenger in the defendants' cars from Philadelphia to Morgan's Corner. The train should have stopped at the latter place; but some defect in the bell-rope prevented the conductor from making the proper signal to the engineer, who therefore went past, though at a speed somewhat slackened on account of

Railroad Company v. Aspell.

the switches which were there to be crossed. The plaintiff, seeing himself about to be carried on, jumped from the platform of the car, and was seriously hurt in the foot. He brought this action; and the jury, with the approbation of the court, gave him \$1,500 in damages.

Persons to whom the management of a railroad is intrusted are bound to exercise the strictest vigilance. They must carry the passengers to their respective places of destination, and set them down safely if human care and foresight can do it. They are responsible for every injury caused by defects in the road, the cars, or the engines, or by any species of negligence, however slight, which they or their agents may be guilty of. But they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness or folly. One who inflicts a wound upon his own body must abide the suffering and the loss, whether he does it in or out of a railroad car. It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained. A railroad company is not liable to a passenger for an accident which the passenger might have prevented by ordinary attention to his own safety, even though the agents in charge of the train are also remiss in their duty.

From these principles it follows very clearly that if a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of travelling back, because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence, for which he can blame nobody but himself. If there be any man who does not know that such leaps are extremely dangerous, especially when taken in the dark, his friends should see that he does not travel by railroad.

It is true that a person is not chargeable with neglect of his own safety when he exposes himself to one danger by trying to avoid another. In such a case, the author of the original peril is answerable for all that follows. On this principle we decided last year at Pittsburgh, that the owners of a steamboat which was endangered by a pile of iron wrongfully left on the wharf, and to get clear of it was backed out into the

Supreme Court of Pennsylvania.

stream, where she was struck by a coal-boat and sunk, had a good cause of action against the city corporation, whose duty it was to have removed the iron. If, therefore, a person should leap from the car under the influence of a well-grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer will be as good as if the same mischief had been done by the apprehended collision itself. When the negligence of the agents puts a passenger in such a situation that the danger of remaining on the car is apparently as great as would be encountered in jumping off, the right to compensation is not lost by doing the latter; and this rule holds good even where the event has shown that he might have remained inside with more safety. Such was the decision in *Stokes v. Saltonstall*,¹ so much relied on by the defendant in error. A passenger in a stage-coach, seeing the driver drunk, the horses mismanaged, and the coach about to upset, jumped out and was thereby much hurt. The court held the proprietors of the line responsible, because the misconduct of their servant had reduced the passenger to the alternative of a dangerous leap or remaining at great peril. But did the plaintiff in the present case suffer the injury he complains of by attempting to avoid another with which he was threatened? Certainly not; he was in no possible danger of any thing worse than being carried on to a place where he did not choose to go. That might have been inconvenient; but to save himself from a mere inconvenience by an act which put his life in jeopardy, was inexcusable rashness.

Thus far I have considered the case without reference to certain facts disclosed in the evidence which tend to diminish the culpability of the defendants' agents, while they aggravate (if any thing can aggravate) the folly of the plaintiff. When he was about to jump, the conductor and the brakeman entreated him not to do it, warned him of the danger, and assured him that the train should be stopped and backed to the station. If he had heeded them, he would have been safely let down at the place he desired to stop at, in less than a minute and a half. Instead of this, he took a leap which promised him nothing but death; for it was made in the darkness of midnight, against a wood-pile close to the track, and from a car going probably at the full rate of ten miles an hour.

Though these facts were uncontradicted, and though the court expressed the opinion that no injury would have happened to the plaintiff but for his own imprudence, the jury were nevertheless instructed that

¹ 13 Pet. 181, *ante*, p. 183.

Railroad Company v. Aspell.

the defendants were bound to compensate him in damages. The learned judge held that the cases of mutual neglect did not apply, because this action was on a contract. Now, a party who violates a contract is not liable, any more than one who commits a tort, for damages which do not necessarily or immediately result from his own act or omission. In neither case is he answerable for the evil consequences which may be superadded by the default, negligence, or indiscretion of the injured party. There is no form of action known to the law (and the wit of man cannot invent one) in which the plaintiff will be allowed to recover for an act not done or caused by the defendant, but by himself.

When the train approached Morgan's Corner, some one (probably the conductor) announced it. Much stress was laid on this fact. The court said, in substance, that to make such an announcement before the train actually stopped was a want of diligence, whereby the plaintiff was thrown into a position of danger; and though he was warned not to jump, yet, having done so, he could make the company pay him for the hurt he received. We think this totally wrong. It is not carelessness in a conductor to notify passengers of their approach to the station at which they mean to get off, so that they may prepare to leave with as little delay as possible when the train stops. And we cannot see why such a notice should put any man of common discretion in peril. It is scarcely possible that the plaintiff could have understood the mere announcement of Morgan's Corner as an order that he should leap, without waiting for a halt. If he did make that absurd mistake, it was amply corrected by the earnest warnings which he afterwards received.

The remark of the court that life and limb should not be weighed against time, is most true; and the plaintiff should have thought of it when he set his own life on the hazard of such a leap, for the sake of getting to the ground a few seconds earlier. Locomotives are not the only things that may go off too fast; and railroad accidents are not always produced by the misconduct of agents. A large proportion of them is caused by the recklessness of passengers. This is a great evil, which we would not willingly encourage by allowing a premium on it to be extorted from companies. However bad the behavior of those companies may sometimes be, it would not be corrected by making them pay for faults not their own.

The court should have instructed the jury that the evidence taken altogether (or even excluding that for the defence), left the plaintiff without the shade of a case.

Judgment reversed and venire facias de novo awarded.

Riding in Unauthorized Manner.

NOTES.

§ 1. **General Doctrines.** — We have printed at the head of this chapter the case of *Morrissey v. The Wiggins Ferry Company*, because it embraces a general statement of a leading doctrine of the courts touching the subject of contributory negligence, and an attempt to apply that doctrine to a case of the death of a passenger through the negligence of the carrier. The rule there laid down originated in the case of *Davies v. Mann*,¹ decided in the English Court of Exchequer in the year 1842. The doctrine of this case has probably been more frequently cited,² less clearly understood, and more generally misapplied than any case relating to the subject.³ It is subject to the objection that in cases of mutual and concurring negligence it compels one party to pay *all* the damages, although the accident was the product of the fault of *both* parties. It can never be applied without producing injustice, unless with one or the other of the following qualifications: 1. The defendant is not to be compelled to pay damages where there was negligence of the plaintiff contributing to the injury, unless the defendant *knew* of the negligence of the plaintiff in time to have saved the plaintiff from the injurious consequences of it; or, 2. The jury should look to the negligence of the plaintiff in mitigation of damages. A few of the courts have adopted the first qualification of the doctrine.⁴ The second qualification is almost universally denied by the courts.⁵ But without reference to the state of the law on the subject, it is believed that the doctrine of *Davies v. Mann*,⁶ reiterated in *Morrissey v. Wiggins Ferry Company*,⁷ cannot, as a general rule, be usefully applied to cases of injuries to passengers by the negligence of carriers. The doctrine there laid down is generally applied to cases of collisions of vessels at sea, collisions of travellers on the highway, and collisions between travellers and railway trains.

§ 2. **Riding in an Unauthorized Manner.** — (1.) *Arm out of Window.* — It is frequently stated as a proposition of law that if the passenger allows any portion of his body to extend beyond the base of an open car-window while the train is in motion, such conduct is negligence *per se*, which disentitles the plaintiff to recover for any injuries received in consequence of coming in contact with any obstruction outside.⁸ The reasons for this rule are nowhere better stated than in the language of THOMPSON, C. J., in *Pittsburgh, etc., Railroad Company v. McClurg*:⁹ "A passenger, on entering a railroad car, is presumed to know the use of the seat and the use of a window: that the former is to sit in, and the latter is to admit light and air. Each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy,

¹ 10 Mee. & W. 545; s. c. 2 Thomp. on Neg. p. 1105.

² For subsequent citations of this case see the table of cases of this work.

³ See an examination of this case in 2 Thomp. on Neg., p. 1155.

⁴ 2 Thomp. on Neg., pp. 1156, 1157, and citations. ⁵ *Id.*, pp. 1146, 1162.

⁶ 10 Mee. & W. 545; s. c. 2 Thomp. on Neg., p. 1105.

⁷ *Ante*, p. 243.

⁸ *Todd v. Old Colony etc. R. Co.*, 3 Allen, 18; s. c. 7 Allen, 207; *Pittsburgh etc. R. Co. v. Andrews*, 39 Md. 329; *Indianapolis etc. R. Co. v. Rutherford*, 29 Ind. 82; *Morel v. Mississippi Ins. Co.*, 4 Bush, 535; *Pittsburgh etc. R. Co. v. McClurg*, 56 Pa. St. 294; *Louisville etc. R. Co. v. Sickings*, 5 Bush, 1; *Holbrook v. Utica etc. R. Co.*, 12 N. Y. 236.

⁹ 56 Pa. St. 294.

Notes.

but not to occupy. Its use is for the benefit of all, — not for the comfort alone of him who has by accident got nearest to it. If, therefore, he sit with his elbow in it, he does so without authority; and if he allow it to protrude out, and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there, nor misled in regard to the fact that it was not a part of the seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is therefore without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken, without his ability to know whether there is danger or not approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court.”¹

On the contrary, the judgment of COLE, J., in *Spencer v. Milwaukee, etc. Railroad Company*² forcibly expresses views which would seem to demonstrate that the question of negligence in cases of this character may ordinarily be properly submitted to the jury. He said: “It is probably the habit of every person, while riding in the cars, to rest the arm upon the base of the window. If the window is open, it is likely to extend slightly outside. This, we suppose, is a common habit. There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so to accommodate the motion of the car. Passengers know this, and must regulate their conduct accordingly. They do not suppose that the agents and managers of the road suffer obstacles to be so placed as barely to miss the car while passing. And it seems to us almost absurd to hold that in every case, and under all circumstances, if the party injured had his arm the smallest fraction of an inch beyond the outside surface, he was wanting in ordinary care and prudence. Of course, a case might be supposed where carelessness would be clearly apparent from the circumstances. If a passenger should ride with his body half out of the car, or with his arms or his feet so protruded that they would inevitably expose him to danger and collision, we should have no hesitation in saying he was utterly reckless.”

The foregoing remarks present a reasonable view of this question. Passengers cannot be expected to sit bolt upright for a succession of days or hours, nor do they. The frames of men are not of cast-iron, and no rule of law should be predicated upon the contrary supposition. It is perhaps not too strong a statement that no person ever travelled upon a railway train without at some time resting his arm upon the window-sill at least, if not permitting it to protrude slightly. Conduct which is universal is necessarily that of persons reasonably prudent. As pointed out by the learned judge last mentioned, it is easy to distinguish between conduct in this particular which is so imprudent as to leave no room for speculation as to negligence, and that which may properly be submitted to the consideration of the jury.

¹ The court in this case expressly overruled the earlier case of *New Jersey etc. R. Co. v. Kennard*, 21 Pa. St. 203, establishing the contrary principle. In *Laing v. Colder*, 8 Pa. St. 479, it was held that if the passen-

ger's extended arm was broken by coming in contact with a bridge, the carrier would not be responsible for the injury if he gave timely notice of the danger, which the plaintiff might have avoided. ² 17 Wis. 487.

 Upon the Platform of the Car.

The Supreme Court of Wisconsin does not stand alone in this position. In *Chicago, etc. Railroad Company v. Pondrom*,¹ it was held (under the rule of comparative negligence prevailing in Illinois) that where a passenger's arm slightly projected outside the window, and was broken in passing a freight-train, the negligence of such person was slight, compared with the negligence of the railroad company in permitting its freight-cars to stand so near the track of its passenger-train, and a recovery might be had for the injury sustained.²

(2.) *Upon the Car Platform.* — Although it is the duty of the passenger to occupy a seat inside of the car when any are to be obtained, yet, as a general rule, the presence of the passenger upon the platform when the car is in motion is not at all times unjustifiable. It may be that proper provision is not made for his accommodation inside, or that he is riding upon the platform by the direction or consent of the company's servants. Thus, in *Willis v. Long Island Railroad Company*,³ the plaintiff, with others, was forced to take a position on the platform of the car, on account of all the seats being taken and the passage-way in the car being occupied by other passengers. The conductor received his fare, and did not inform him that there were vacant seats in other cars of the train. A collision took place between this train and another, and the plaintiff was injured. The Court of Appeals, affirming the decision of the Supreme Court, held that the position of the plaintiff did not of itself, independent of the statute in New York on this subject,⁴ bar his recovery of damages for his injuries. PORTER, J., said: "There is no rule of the common law which makes it the duty of the passenger to select a position in the vehicle least exposed to danger through the wrongful act of the proprietor. A seat on the outside of a stage-coach may be more hazardous than an inside seat, if the driver negligently overturns it on a pavement or a hillside; but the selection of that position is neither negligence *per se*, nor tributary to it."⁵ SMITH, J., in commenting on the statute which enacts that a railroad company shall not be liable to passengers for injuries received while standing on the platform, provided it "furnished room inside its passenger-cars sufficient for proper accommodations of the passengers," stated that the language meant a *seat* for each passenger, and not merely standing-room in the passage-way. It meant also a *vacant* seat, and not one occupied by another passenger, either with his person or his luggage, although so occupied improperly. A seat should be furnished *by the company*.⁶ It was not the duty of the passenger, at the risk of trespassing on the rights of another, or engaging in a personal controversy, to compel another to yield a portion of the seat so occupied. Although there were vacant seats in other parts of the train the plaintiff was not obliged to incur the peril of passing from one car to another while the train was in motion. Neither was it incumbent upon him to crowd himself into the passage-way of the car. "That part of the car is just what its name indicates, — a *way* through the car. Each passenger seated

¹ 51 Ill. 333.

² See also *Winters v. Hannibal etc. R. Co.*, 39 Mo. 468; *Barton v. St. Louis etc. R. Co.*, 52 Mo. 253. It is not negligence *per se* for a passenger to expose his hand or arm outside of a street car. *Miller v. St. Louis etc. R. Co.*,

5 Mo. App. 471; s. c. 6 Cent. L. J. 335; *Seigel v. Eisen*, 41 Cal. 109.

³ 32 Barb. 399; s. c. 34 N. Y. 670.

⁴ Laws 1850, chap. 140, § 46; 3 Edm. Stats. at Large, 636, § 46.

⁵ See *Keith v. Pinkham*, 43 Me. 501.

⁶ See also *Davis v. Railroad Co.*, 53 Mo. 317.

Notes.

in the car has a right to pass along the way at any and all times, and he therefore has a right to insist that it shall be at all times open and unobstructed. The company cannot rightfully compel a passenger to stand in it, instead of furnishing him with a seat; and even if he consents to do so, they have no right to place him there as against the passengers who are seated."¹

The foregoing case undoubtedly puts this matter in the most favorable light possible for the passenger. It is also held in other cases that the presence of the passenger upon the platform when the train is in motion is not *per se* negligence.²

The statute in New York, previously noticed, is regarded as penal in its nature, and therefore is strictly construed. It provides that a person injured while standing on the platform of a car cannot sustain an action for the injury, provided a notice is posted *inside* the car forbidding passengers to take such a position, and there is room inside of the car. This does not prevent a recovery by a passenger injured while standing on the platform, where the car is full inside, and the only notice not to occupy the platform is posted *outside* of the car, and is not shown to have come to such passenger's knowledge.³

In some States a less favorable view is taken of the passenger's position, in cases of this character. Thus, in *Hickey v. Boston, etc. Railroad Company*,⁴ the Supreme Judicial Court of Massachusetts laid down the general rule that a passenger cannot recover damages for a personal injury sustained by him in consequence of his voluntarily and unnecessarily standing upon the platform of a passenger-car while the train is in motion. The facts of this case were, that it was the custom of the train-men to uncouple the engine and smoking-car from the rest of a passenger-train on approaching a certain station, so that the former might be switched off on a side track and the remainder of the train run slowly upon the main track to the station. Passengers in the smoking-car were accustomed to pass from thence to the platform of the first passenger-car, just before the uncoupling, and remain there until the train reached the station. This was done by the express permission of the conductor and brakemen, and without objection from the superintendent and directors, who knew of the practice. On one occasion the engine and smoking-car ran off upon the wrong track, in consequence of the displacement of a switch, and part of the smoking-car was thrown across the main track. The remainder of the train, following upon the main track, came into collision with this obstruction, and the plaintiff's husband, who was riding upon the front platform of the first car, was fatally injured. The court held that the express permission of the managers of the train, and the implied assent of the officers of the corporation to the passenger occupying this position, did not change the relations between the parties, nor their several obligations. Because the passenger rightfully occupied the position in question, it did not follow that it was at the risk of the corporation. If sufficient and suitable provision were made within the cars for all passengers, the managers of the train were under no obligation to restrict them to their proper places, nor to

¹ 34 N. Y. 682.

² *Zemp v. Wilmington etc. R. Co.*, 9 Rich. L. 84; *Lafayette etc. R. Co. v. Sims*, 27 Ind. 59; *Macon etc. R. Co. v. Johnson*, 38 Ga. 409.

³ *Clark v. Eighth Avenue R. Co.*, 32 Barb.

657; s. c. 36 N. Y. 135. See also *Colegrove v. New York etc. R. Co.*, 6 Duer, 382; s. c. 20 N. Y. 492; *Carroll v. New York etc. R. Co.*, 1 Duer, 571, 579.

⁴ 14 Allen, 429.

 Upon the Platform of the Car.

prevent them from acts of imprudence. Very much the same view was taken by the Supreme Court of Illinois in *Quinn v. Illinois, etc. Railroad Company*.¹ The plaintiff's husband voluntarily placed himself, with several others, upon the platform and steps of the car, when there was abundant standing-room inside, though the seats were all full, and, in an endeavor to recover a bank-bill which was blown away while passing from the hand of the conductor to that of the passenger, fell against an embankment, and was thrown back under the cars and killed. The court held that the death of the passenger could be attributed only to his own recklessness.²

Special circumstances may make it necessary for a passenger to stand upon the platform, and thereby excuse what would otherwise be negligent conduct. Thus, where the plaintiff, in the performance of his duty as a guard over prisoners, was required to stand at the door of a car, it was held that he was not in fault for so doing.³

It is almost needless to add, that if a passenger, seeing a collision of trains to be inevitable, rushes to the door of the car in which he is riding, with the intention of jumping off the train, and is caught and injured while upon the platform, the ordinary inhibition against riding upon the platform has no application to his case.⁴ One cannot through his default put another in peril, and then demand that he shall exercise the highest degree of prudence in extricating himself.⁵

In the absence of a statute upon this subject, it is evident that the position of a passenger on the platform of a street car is not subject to the same rule as that of a passenger on the platform of a steam-railroad car. The cars of the former do not run at the same speed, are not attended with the same danger, as those of the latter, and the rules applicable to one seldom are to the other.⁶ Therefore it is held that riding upon the outside platform of a street-railroad car is not such a want of ordinary care as to prevent a recovery for an injury sustained by being thrown therefrom,⁷ even though there is room inside.⁸ In *Spooner v. Brooklyn City Railroad Company*,⁹ the plaintiff was a passenger upon a stage-sleigh run by the defendant. The sleigh was provided with wide foot-boards or guards on the sides, upon which passengers usually rode when the seats were occupied. Hand-rails were placed on the ends of the seats, for the convenience of those standing on the foot-boards. Passengers were received to ride there, and their

¹ 51 Ill. 495.

² See also *Higgins v. Harlem etc. R. Co.*, 2 Bosw. 132. Compare *Clark v. Eighth Avenue R. Co.*, 36 N. Y. 135.

³ *Truex v. Erie R. Co.*, 4 Lans. 198.

⁴ *Buel v. New York etc. R. Co.*, 31 N. Y. 314. But see *Collins v. Albany etc. R. Co.*, 12 Barb. 492.

⁵ *Jones v. Boyce*, *ante*, p. 246; *Ingalls v. Bills*, *ante*, p. 112; *Stokes v. Saltonstall*, *ante*, p. 183.

⁶ *Lynam v. Union R. Co.*, 114 Mass. 83; *Miller v. St. Louis etc. R. Co.*, 5 Mo. App. 471; *s. c.* 6 Cent. L. J. 335.

⁷ *Meesel v. Lynn etc. R. Co.*, 8 Allen, 234; *Augusta etc. R. Co. v. Renz*, 55 Ga. 126. The act of the conductor of a street-railroad car

in compelling a lad who had paid his fare to give up his seat and stand upon the front platform, has been held sufficient to absolve this passenger from the imputation of negligence in this particular. The company was therefore responsible for his death, caused by being thrown from the car by the hasty and careless departure of another passenger. *Sheridan v. Brooklyn City etc. R. Co.*, 36 N. Y. 39.

⁸ *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Burns v. Bellefontaine R. Co.*, 50 Mo. 139. But see *Baltimore R. Co. v. Wilkinson*, 30 Md. 224; *Ward v. Central Park R. Co.*, 11 Abb. Pr. (N. S.) 411.

⁹ 54 N. Y. 230 (reversing *s. c.* 31 Barb. 419).

Notes.

fares collected without objection. No seat being accessible to the plaintiff, he rode in this manner, and was injured by a collision with another sleigh. It was held that his conduct was not negligent *per se*, but whether it was negligent was proper to be considered by the jury.

(3.) *In the Baggage-Car.*—It is no doubt a reasonable regulation that passengers shall not ride in the baggage-car. The safety of the passenger, the unimpeded discharge of duty by the company's servants, and the security of property are considerations in support of this rule. All passengers are probably aware that the hazards of travel are increased by riding in this portion of the train. But if they choose to ride there, and do so with the knowledge of, and without objection on the part of, the conductor of the train, the company cannot take advantage of their regulation in this particular to charge the passenger with negligence. The conductor is vested with discretion in the discharge of his duties, and the company is responsible for the exercise of it.¹ The language of Bosworth, J., in an important case,² on this subject, fully explains the relations of passenger and carrier in cases of this kind: "He took a seat in the post-office department of the baggage-car. The position was injudiciously chosen, and may be assumed to have been known to him to have been a far more dangerous one than a seat in a passenger-car. But he took it with the assent of the conductor. He was not there as a trespasser, or wrongfully, as between him and the defendants. So far as all questions involved in the decision of this action are concerned, he was lawfully there. His being there was not such negligence, in the legal sense of the term, as exonerates the defendants from the consequences of injuring him by such culpable negligence as consists in running two trains of their cars so violently into each other as to entirely demolish the car in which he was sitting."³

Even though the passenger is duly informed of a regulation excluding passengers from the baggage-car, yet if he is suffered to remain there he does not do so at his peril; the company is still under the obligation to exercise the highest care for his safety.⁴

In many of the States it is provided by statute, as in New York, that "in case any passenger on any railroad shall be injured while on the platform of a car, or on any baggage, wood, or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger-cars then in the train, such company shall not be liable for the injury; provided such company at the time furnished room inside its passenger-cars sufficient for the proper accommodation of passengers."⁵ The company must strictly comply with the terms of this statute in order to secure its benefit,⁶ but

¹ O'Donnell v. Allegheny etc. R. Co., 59 Pa. St. 239; Watson v. Northern R. Co., 24 Upper Canada Q. B. 98.

² Carroll v. New York etc. R. Co., 1 Duer, 571.

³ *Contra* is the principle of the decision of the Supreme Judicial Court of Massachusetts in Hickey v. Boston etc. R. Co., 14 Allen, 429. This was the case of a passenger injured while riding upon the platform of one of two colliding cars, with express permission of the conductor. Said WELLS, J.:

"It is not enough for the plaintiff to show that Hickey was rightfully upon the platform. Because he might rightfully occupy whatever place the conductor should permit, it does not follow that he would do so at the risk exclusively of the corporation."

⁴ Jacobus v. St. Paul etc. R. Co., 20 Minn. 125; s. c. 1 Cent. L. J. 375.

⁵ Laws N. Y. 1850, chap. 140, § 46; 3 Edm. Stats. at Large, 636, § 46; Wag. Mo. Stats. 312, § 45.

⁶ Carroll v. New York etc. R. Co., 1 Duer,

In Various Positions.

having done so, its immunity from liability for injuries from this source is complete.¹

(4.) *In Various Positions.*—The passenger is not, as a matter of law, obliged to remain in his seat from the time he first takes it until the train comes to a final stop at his destination.² Therefore it is a question for the jury whether he is lacking in reasonable care in leaving his seat and standing in the passage-way of the car, for the purpose of hastening his departure, after the approach of the train to the station at which he is to alight has been announced;³ or in standing in the aisle and making preparations to leave by brushing and plaiting a child's hair;⁴ or, having entered a car, and finding no seats vacant, in continuing to stand, looking about for a seat.⁵

In *Gee v. Metropolitan Railway Company*,⁶ the passenger got up from his seat and put his hand on the bar which crossed the window of the door of the carriage, for the purpose of looking out to see the signal-lights and to show them to a fellow-passenger. Leaning forward a little upon the door, it flew open, and he fell out and was injured. There was no further evidence as to the construction of the door and its fastenings. The jury having found for the plaintiff, leave was reserved to enter a nonsuit, on the ground that there was no evidence of the defendants' liability. It was held by the Court of Exchequer Chamber (affirming the decision of the court below) that the verdict ought to stand. Said *COCKBURN, J.*: "The passenger did nothing more than that which came within the scope of his enjoyment while travelling, without committing any imprudence. In passing through a beautiful country, he certainly is at liberty to stand up and look at the view; not in a negligent, but in the ordinary manner of people travelling for pleasure." But a passenger is not justified in leaving his seat and incurring a known and ascertained danger for the purpose of obviating a slight inconvenience. Thus, in *Adams v. Lancashire, etc. Railway Company*,⁷ the door of the compartment of the carriage in which the plaintiff was riding flew open three times, and each time the plaintiff succeeded in shutting it without accident. The weather was pleasant. There was room in the carriage for the plaintiff to sit away from the door, and the train would have stopped at a station in three minutes. The door opened a fourth time, and in endeavoring to shut it again, the plaintiff fell out and was hurt. It was held that he had no right to run the risk of attempting to shut the door; and although there was evidence of the defendants' negligence from the defective condition of the lock, yet the injury suffered was not the necessary or natural result of the company's negligence, and they were not liable for the injury.⁸

571; *Clark v. Eighth Avenue R. Co.*, 32 Barb. 657; s. c. 36 N. Y. 135; *Colegrove v. Harlem etc. R. Co.*, 6 Duer, 382; s. c. 20 N. Y. 492.

¹ *Higgins v. Hannibal etc. R. Co.*, 36 Mo. 418.

² *Gee v. Metropolitan R. Co.*, L. R. 8 Q. B. 161.

³ *Barden v. Boston etc. R. Co.*, 121 Mass. 426; s. c. 16 Am. L. Reg. 664.

⁴ *Railroad Co. v. Pollard*, 22 Wall. 341.

⁵ *Pollard v. N. Y. etc. R. Co.*, 7 Bosw. 437.

⁶ L. R. 8 Q. B. 161; s. c. 42 L. J. (Q. B.) 105; 21 Week. Rep. 584; 28 L. T. (N. S.) 582.

⁷ L. R. 4 C. P. 739.

⁸ In *Gee v. Metropolitan R. Co.*, *supra*, the principle declared in this case was approved, but its application to the facts therein denied, by Mr. Justice Keating. In reading this case it is essential to bear in mind the difference in construction between railway coaches in this country and the passenger carriages in England. The doors in the latter are on the side of the carriage, opening outwards, and are regularly locked and unlocked by the guard at the beginning and end of the journey.

Notes.

A passenger cannot be said to be in the exercise of due care who voluntarily and unnecessarily places his hand upon the framework of the door of the carriage, so that when the door is closed it must be inevitably crushed. Thus, in *Richardson v. Metropolitan, etc. Railway Company*,¹ a passenger, after getting into a carriage of a train on the defendants' railway, left his thumb for the space of half a minute in the door-jamb; the guard, after crying out to the passengers to take their places, shut the doors of the carriages, and, not seeing the plaintiff's thumb, crushed it in so doing. The evidence demonstrated that the doors were shut in the ordinary manner, and the accident was attributable only to the plaintiff's negligence. This case was distinguished from that of *Fordham v. London, etc. Railway Company*,² where the plaintiff, in getting into the railway carriage, having a parcel in his right hand, placed his left hand on the back of the open door, to aid him in mounting the step. There was conflicting evidence as to whether there was a proper handle affixed to the carriage, to the right of the door. The night was dark, and the plaintiff did not see any handle. Before he had completely entered the carriage, the guard, without any previous warning, closed the door, and crushed his hand between the back of the door and the door-post. The Court of Exchequer Chamber (affirming the decision of the court below) held that there was evidence of negligence on the part of the company's servant, and no evidence of such contributory negligence on the part of the plaintiff as to entitle the defendants to a nonsuit. So also, in *Coleman v. South-Eastern Railway Company*,³ the plaintiff, a boy twelve years of age, in company with his father, had entered a third-class carriage at night, and, in feeling for a seat, placed his hand on the door-jamb, which was very near the seat. The porter at that moment violently closed the door, which crushed the plaintiff's fingers and struck his father, who entered after him, on the back. It was held that the evidence of negligence on the part of the porter was properly submitted to the jury, and that there was no contributory negligence on the part of the plaintiff.

A case of this character has lately come before the House of Lords,⁴ the facts of which were these: The plaintiff was a passenger on the defendants' railway, the carriage in which he rode being overloaded. When the train arrived at a certain station, the door was opened by people from the outside, who endeavored to crowd their way in. The plaintiff voluntarily rose, or partly rose, from his seat to push these persons back. The train happened to move on. The plaintiff was jerked forward, and put his hand on the hinge of the carriage door at the very moment the door was in course of being shut by the porter, in consequence of which the plaintiff's thumb was injured. It was not proved that the porter saw the plaintiff fall forward, or could have prevented the accident. It was therefore held that what happened was a pure accident, and that the defendants were not responsible.

It is not negligence, as a matter of law, for a passenger to follow the direction given by a servant of the railroad company, and to pass from one car to another for the purpose of finding a seat. It is properly left to the jury to say whether the passenger was guilty of negligence, in view of the direction given, in

¹ 37 L. J. (C. P.) 300.

² L. R. 3 C. P. 368; s. c. 37 L. J. (C. P.) 176;
L. R. 4 C. P. 619.

³ 4 Hurl. & Coll. 639.

⁴ Metropolitan R. Co. v. Jackson, 3 App
Cas. 193; s. c. L. R. 10 C. P. 49; 44 L. J. (C. P.)
83.

In the Baggage-Car.

attempting to pass at once from one car to another, although the cars were in rapid motion, the night dark, rain and sleet falling and freezing, and none of the company's employees at hand to render assistance in the passage.¹ So also it is the province of the jury to determine both the nature and effect of the conductor's remarks; whether they were intended and understood as an order to change from car to car, or were by way of advice, and also whether such remarks affected the action of the passenger, and caused him to act differently from the manner in which he otherwise would have acted.²

There are certain portions of every carrier's vehicles which are so obviously dangerous for a passenger to occupy, and so plainly not designed for his reception, that the presence of the passenger there will constitute negligence as a matter of law, and preclude him from claiming damages for injuries received while in such position. For instance, the engine would seem to be a place designed exclusively for the employees of a railroad company, even in the absence of regulations forbidding the presence of passengers thereon. Therefore a person who applied to the engineer of a train for permission to ride upon his engine, and was informed that it was against the rules of the company to carry him in that place, but finally obtained the engineer's consent and rode there, paying no fare, and without the knowledge of the conductor, was held to be a wrong-doer, and unlawfully in such position, and properly nonsuited in an action for damages received in consequence of the engine running upon an obstruction on the track.³ So also a laborer in the employ of the railroad company on a construction-train, being told by the person in charge of the train that they were behind time and must hurry, and to "jump on anywhere," climbed upon the pilot of the locomotive, and rode there until he was injured by a collision of the engine with cars standing upon the track. The train consisted of the locomotive, tender, and box-car in which he ought to have ridden. He had previously been warned against riding on the pilot by the person who gave the order to jump on at this time. The Supreme Court of the United States held that riding in this position constituted negligence *per se*, and that neither the direction to "jump on anywhere," nor the knowledge of the engineer that he was riding in this position, in any manner justified his doing so. SWAYNE, J., said: "As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive."⁴

¹ McIntyre v. New York etc. R. Co., 37 N. Y. 287.

² Cleveland etc. R. Co. v. Manson, 30 Ohio St. 451.

³ Robertson v. New York etc. R. Co., 22 Barb. 91. See also Doggett v. Illinois etc. R. Co., 34 Iowa, 284, where the passenger voluntarily got upon the tender of the engine to ride, and while in this position was killed by the engine breaking through a defective culvert. A caboose was attached to the train for passengers, and it appeared that if the deceased had been in there he would have escaped injury. On these facts, he was held to have been clearly guilty of contributory negligence. *Contra* is the judgment of the Supreme Court of Indiana in an early case (Lawrenceburgh etc. R.

Co. v. Montgomery, 7 Ind. 474). The plaintiff got upon a gravel-train of the defendants, and was informed by the engineer having charge of the locomotive and train of his orders to transport no passengers. However, he paid his fare to the engineer, who consented to his riding on the tender of the locomotive, but directed him not to go upon the cars. By a collision of trains the plaintiff was injured. It was held that although the plaintiff was acting at the time in disobedience of a proper order to secure his safety, it should also appear that the injury was occasioned by such disobedience. See Keith v. Pinkham, 43 Me. 501.

⁴ Railroad Co. v. Jones, 95 U. S. 439; s. c. 6 Cent. L. J. 45, *ante*, p. 248. Compare with this case a decision by the same learned justice

Notes.

If a passenger occupies a position designed for his reception, it cannot be said as a matter of law that he is guilty of negligence in remaining in such position, although another might be safer. Thus, it was held to be a question for the jury whether a passenger on a steamboat, injured by the fall of a boat upon him, was in the exercise of due care in taking his position under the boat, suspended over a part of a deck where it was proper for passengers to be, and in continuing to stand there without attempting to move away, while he saw two or three persons enter it in addition to two others whom he had previously noticed there.¹ A passenger, however, in search of a water-closet, without making proper inquiries, is not at liberty to go upon any part of the boat, into places not designed for the reception of passengers and under circumstances of danger.² So also a passenger on a railway train, having escaped uninjured from a car which caught fire, as there was evidence tending to show, by the negligence of the company, was held guilty of such negligence that he could not recover for burns and other injuries received in rushing back into the car again for the purpose of recovering his valise.³

§ 3. **Leaping on or off Cars in Motion.** — Circumstances may justify an act of this kind. In *Jones v. Boyce*,⁴ Lord ELLENBOROUGH said: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences." Therefore if a passenger in a coach, by reason of peril arising from an accident for which the proprietors thereof are liable, is in so dangerous a situation as to render his leaping from the coach an act of reasonable precaution, and he leaps therefrom and injures himself, the proprietors are answerable to him in damages, though he might safely have retained his seat.⁵ And the rule

(*Indianapolis etc. R. Co. v. Horst*, 93 U. S. 291; s. c. 15 Alb. L. J. 61), the facts of which were as follows: The plaintiff and other drovers, in charge of cattle upon a train, were directed by the conductor to get out of the caboose and get on top of the train, as the caboose was to be detached, stating that at some distance further up the road he would attach another. The train was at rest, and the plaintiff and others did as the conductor told them to do. By a violent jerking and backing of the train the plaintiff was thrown down between the ends of two cars. On these facts the court expressed itself as follows: "We have said that riding on the top of a freight-car in the night involved peril. When commanded to go there, the plaintiff had no choice but to obey, or to leave his cattle to go forward without any one to accompany and take care of them. The command was wrong. To give him no warning was an aggravation of the wrong. He, however, rode safely to the switch, standing in one place. He had a right to assume that the posture and place would continue to be safe. He had no foreknowledge of the coming shock. The conductor knew it, but gave him no word of caution or notice. He was unaware of dan-

ger until the catastrophe was upon him. The behavior of the conductor was inexcusable. If there was fault on the part of the plaintiff, in what did it consist? We find nothing in the record which affords any warrant for such an imputation."

A regulation by which a passenger with live-stock on the freight-train is required to remain on the cars which contain his stock is not so transgressed by his being in another part of the train, when it is at rest, by the direction of the conductor, as to make him a contributor to his own injury by that train being run into by another. *Pennsylvania R. Co. v. McCloskey's Administrator*, 23 Pa. St. 526.

¹ *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 361; s. c. 100 Mass. 34. See also *Greenland v. Chaplin*, 5 Exch. 243; *Willis v. Long Island etc. R. Co.*, 34 N. Y. 670.

² *Dougan v. Champlain Transp. Co.*, 6 Lans. 430.

³ *Hay v. Great Western R. Co.*, 37 Upper Canada Q. B. 456.

⁴ 1 Stark. 493, *ante*, p. 246.

⁵ *Jones v. Boyce*, *supra*; *Ingalls v. Bills*, *ante*, p. 112; *Stokes v. Saltonstall*, *ante*, p. 183; *McKinney v. Neil*, 1 McLean, 540; *Frink v. Potter*, 17 Ill. 406.

Time for Passenger to alight.

here announced is applicable to passengers upon railway trains. Apprehending a collision of trains, a passenger is justified in seeking safety in an endeavor to leap from the car in which he is riding.¹ Although some degree of danger may be imminent to a passenger remaining on board the train, yet the conduct of the passenger in leaping from the train may evince such rashness that he is not entitled to recover.²

When the passenger is not granted a reasonable length of time for alighting, and will be subjected to the inconvenience of being carried beyond his destination, is he then justified in leaping from the train? The general rule is that he is not; and he therefore is not entitled to recover for injuries received from such an act.³ But this rule is subject to exceptions. For instance, to step from a car not yet beyond the platform, and whose motion is so slight as to be almost or quite imperceptible, may not be negligence, and whether it is or not is for the jury to decide from the physical condition of the person and all the attendant circumstances;⁴ or it may be a matter of such necessity that the passenger should leave the train that he will be justified in making the attempt;⁵ or the passenger may act under the command or advice of the company's agents in so doing;⁶ or may be assisted off by the company's servants.⁷

The conduct of a passenger in running after or alongside a rapidly moving train, and endeavoring to leap or climb upon it, is in general an indication of such recklessness that he cannot recover for injuries received in the attempt.⁸ Especially is this true in the case of a passenger endeavoring to climb upon a car-platform already crowded, the train moving rapidly, and persisting in the

¹ *Buel v. New York etc. R. Co.*, 31 N. Y. 314; *Eldridge v. Long Island etc. R. Co.*, 1 Sandf. S. C. 89; *South-Western R. Co. v. Paulk*, 24 Ga. 356; *Wilson v. Northern Pacific R. Co.* (Sup. Ct. Minn. 1879), 10 Cent. L. J. 56. But see *Collins v. Albany etc. R. Co.*, 12 Barb. 492.

² *Galena etc. R. Co. v. Yarwood*, 15 Ill. 468; *s. c.* 17 Ill. 509; *Galena etc. R. Co. v. Fay*, 16 Ill. 558; *Hill v. New Orleans etc. R. Co.*, 11 La. An. 292.

³ *Railroad Co. v. Aspell*, *ante*, p. 252; *Jeffersonville etc. R. Co. v. Hendricks's Administrator*, 26 Ind. 228; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Burrows v. Erie R. Co.*, 63 N. Y. 556 (reversing *s. c.* 3 Thomp. & C. 556); *Damont v. New Orleans etc. R. Co.*, 9 La. An. 441; *Dougherty v. Chicago etc. R. Co.*, 86 Ill. 467; *Gavett v. Manchester etc. R. Co.*, 16 Gray, 501; *Lucas v. New Bedford etc. R. Co.*, 6 Gray, 64; *Ginnon v. New York etc. R. Co.*, 3 Robt. 25. If the train has stopped a sufficient length of time for passengers to get off, the attempt to do so after the train has started will be wholly inexcusable. *Illinois etc. R. Co. v. Slotton*, 51 Ill. 139. Or if the passenger gets off after being warned that the train has not yet reached the station. *Ohio etc. R. Co. v. Schiebe*, 44 Ill. 460. Or if the passenger, knowing that the train

will stop at the station, leaps off before it has come to a stop. *Ohio etc. R. Co. v. Stratton*, 78 Ill. 88; *s. c.* 3 Cent. L. J. 415. Compare *Kentucky etc. R. Co. v. Dills*, 4 Bush, 593.

⁴ *Doss v. Missouri etc. R. Co.*, 59 Mo. 27; *Illinois etc. R. Co. v. Able*, 59 Ill. 131; *Kentucky etc. R. Co. v. Dills*, 4 Bush, 593.

⁵ *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292; *Lloyd v. Hannibal etc. R. Co.*, 53 Mo. 509.

⁶ *Georgia R. etc. Co. v. McCurdy*, 45 Ga. 288; *Lambeth v. North Carolina R. Co.*, 66 N. C. 494; *Lovett v. Salem R. Co.*, 9 Allen, 557; *Filer v. New York etc. R. Co.*, 68 N. Y. 124; *s. c.* 59 N. Y. 351; 49 N. Y. 47; *Pennsylvania R. Co. v. McCloskey's Administrator*, 23 Pa. St. 526. But it may be a question for the jury whether a reasonable man would have acted upon such advice. *Hazard v. Chicago etc. R. Co.*, 1 Biss. 503; *s. c.* 26 Ill. 373; *Chicago etc. R. Co. v. Randolph*, 53 Ill. 510; *Jeffersonville etc. R. Co. v. Swift*, 26 Ind. 459; *Pittsburgh etc. R. Co. v. Krouse*, 30 Ohio St. 222.

⁷ *Columbus etc. R. Co. v. Powell*, 40 Ind. 37.

⁸ *Phillips v. Rensselaer etc. R. Co.*, 49 N. Y. 177; *s. c.* 57 Barb. 644; *Chicago etc. R. Co. v. Seates* (Sup. Ct. Ill. 1879), 9 Cent. L. J. 167; *Knight v. Pontchartrain R. Co.*, 23 La. An. 462; *Hubener v. New Orleans etc. R. Co.*, 23 La. An. 492.

Notes.

attempt, although once shaken off by the jerking of the train.¹ But this rule is subject to qualification. It has been held that the mere fact that the train is distinctly moving, or under way, does not in every case make it negligence, in law, to make the attempt; especially where, by reason of the negligence of the trainmen, a reasonable opportunity has not been given to get on. Such a case should be submitted to the jury.²

We have previously noticed there is little analogy between the operation of steam-cars and the vehicles ordinarily run upon street-railroad tracks. Therefore it would seem to have been properly held that it is not negligence, as a matter of law, for a passenger to leap from a street-railroad car while in motion, after a failure on the part of the persons managing the same to bring it to a stop when requested.³

§ 4. **Getting on and off Train at a Dangerous Place.**—When, by reason of the insufficiency of the station, or length of the train, or negligence in the operation of it, passenger-cars are brought to a stand at places where there is no landing or other conveniences for getting off the train, if it is reasonable to suppose that no better opportunity will be granted for this purpose, the passenger may alight, although the position is inconvenient or slightly dangerous. If the company's servants have given the passenger an express invitation to alight,⁴ or their conduct is such as to imply an invitation,⁵ the passenger will be justified in making the attempt. But if the passenger is aware that the train is not opposite a platform, and in alighting at such a place is guilty of a reckless indifference as to his safety, he cannot recover for injuries received.⁶

¹ *Phillips v. Rensselaer etc. R. Co.*, *supra*. See also *Harper v. Erie R. Co.*, 32 N. J. L. 88.

² *Johnson v. West Chester etc. R. Co.*, 70 Pa. St. 357; s. c. 11 Am. L. Reg. 159.

³ *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Criskey v. Hestonville etc. R. Co.*, 75 Pa. St., 83; *Philadelphia etc. R. Co. v. Hassard*, 75 Pa. St. 367; s. c. 1 Cent. L. J. 373. *Contra*, *Nichols v. Sixth Avenue R. Co.*, 38 N. Y. 131. But in this case the court ruled that the mere preparation to leave a street-car while in motion is not of itself negligence, if there are indications of its stopping. Therefore a person could recover for injuries received by being shaken off a car by a sudden movement, while standing on the platform waiting for it to stop. See also *Chicago City R. Co. v. Munford* (Sup. Ct. Ill. 1880), 21 Alb. L. J. 214.

⁴ *Foy v. London etc. R. Co.*, 18 C. B. (N. S.) 225.

⁵ *Robson v. North-Eastern R. Co.*, L. R. 10 Q. B. 271; *Bridges v. London etc. R. Co.*, L. R. 6 Q. B. 377; s. c. 40 L. J. (Q. B.) 188; L. R. 7 H. L. 213; 43 L. J. (Q. B.) 151; 23 Week. Rep. 62; 30 L. T. (N. S.) 844; *Whittaker v. Manchester etc. R. Co.*, L. R. 5 C. P. 464, note (3); *Petty v. Great Western R. Co.*, L. R. 5

C. P. 461, note (1); *Thompson v. Belfast etc. R. Co.*, Irish Rep. 5 C. L. 517; *Scott v. Dublin etc. R. Co.*, 11 Irish C. L. (N. S.) 377; *Nicholls v. Great Southern R. Co.*, Irish Rep. 7 C. L. 40; *Weller v. London etc. R. Co.*, L. R. 9 C. P. 126; s. c. 43 L. J. (C. P.) 137; 22 Week. Rep. 302; 29 L. T. (N. S.) 888; *Praeger v. Bristol etc. R. Co.* (MS.), 24 L. T. (N. S.) 105 (stated at length in L. R. 7 C. P. 323); *Cockle v. London etc. R. Co.*, L. R. 7 C. P. 321; s. c. 41 L. J. (C. P.) 140; L. R. 5 C. P. 457; 39 L. J. (C. P.) 226; 27 L. T. (N. S.) 320; 20 Week. Rep. 754; *Delamaty v. Milwaukee etc. R. Co.*, 24 Wis. 578; *Evansville etc. R. Co. v. Duncan*, 28 Ind. 441; *Taber v. Delaware etc. R. Co.*, 71 N. Y. 489; *Central R. Co. v. Van Horn*, 38 N. J. L. 133; *Columbus etc. R. Co. v. Farrell*, 31 Ind. 408. The decisions in *Siner v. Great Western R. Co.*, L. R. 3 Exch. 150; s. c. L. R. 4 Exch. 117, and *Pabst v. Baltimore etc. R. Co.*, 2 McArthur, 42, may be regarded as quite out of line with authority, and inconsistent with later adjudications on this subject. *Ante*, p. 229, § 18.

⁶ *Harrold v. Great Western R. Co.*, 14 L. T. (N. S.) 440; *Lewis v. London etc. R. Co.*, L. R. 9 Q. B. 66; 43 L. J. (Q. B.) 8; *Evansville etc. R. Co. v. Duncan*, 28 Ind. 441.

Duty of Carrier to provide Means of Egress.

If a railroad train is stopped at night merely for the purpose of allowing a train which is expected from the opposite direction to pass by, without notice given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and walks into an open cattle-guard, and receives a personal injury, cannot maintain an action against the company to recover damages therefor; and it is immaterial that he was misinformed by some person not in the employment of the company that he must go and see to having his baggage passed at a custom-house, supposed to have been reached by the train, or that the train was near a passenger-station, which was not the place of his destination.¹

Wherever a railroad company is in the habit of receiving passengers, whether at a station or some point outside, or if by the regular operation of trains it is necessary to traverse portions of the premises outside of the station-house, passengers have a right to assume that such parts of the premises are in a safe condition for such purpose, even on a dark night.²

When the railroad company have provided safe and convenient means for passengers to get on and off their trains, if the passenger uses a way of his own choice, in preference to that provided by the company, he will be responsible for accidents which happen in consequence.³

Injuries frequently happen to passengers by being run over by other trains passing through stations, while taking or leaving their own trains. In cases of this kind, it would seem that if the running arrangements of the road are such that it is *necessary* to pass over a railroad track in order to take or leave a train, the passenger may rightfully expect protection against the running of trains at such a time, and may therefore properly relax that vigilance for his safety which is ordinarily demanded of one coming upon a railroad track.⁴ But if the presence of the passenger on the track is not essential to his getting on and off the train, and he has neglected safe and convenient means provided by the company for this purpose, he is there at his peril.⁵

The Supreme Judicial Court of Massachusetts, which, in all cases of tort arising out of negligence, holds the plaintiff very strictly to the proof of exercise of due care on his own part as a condition precedent to his right of recovery, has held, in cases of injury to passengers, where there was a reasonable justification for their being on the track, that they are nevertheless bound to exercise due care in such position, and that it is a question for the jury whether they were careless or not at the time of the injury. It was so held in *Warren v. Fitchburg, etc. Railroad Company*,⁶ where the plaintiff bought a ticket at a station, and the

¹ *Frost v. Grand Trunk R. Co.*, 10 Allen, 387.

² *Hulbert v. New York etc. R. Co.*, 40 N. Y. 145; *McDonald v. Chicago etc. R. Co.*, ante, p. 93; *Dillaye v. New York etc. R. Co.*, 56 Barb. 30; *Knight v. Portland etc. R. Co.*, 56 Me. 234; *Martin v. Great Northern R. Co.*, 16 C. B. 179; *Nicholson v. Lancashire etc. R. Co.*, ante, p. 85. Passengers are not, however, justified in taking a course of their own across the company's premises, for the purpose of reaching the train sooner than by the customary way. *Burgess v. Great Western R. Co.*, 6 C. B. (N. S.) 923.

³ *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; s. c. 37 Pa. St. 420; *Bancroft v. Boston etc. R. Co.*, 97 Mass. 275; *Gonzales v. New York etc. R. Co.*, 50 How. Pr. 126; *Forsyth v. Boston etc. R. Co.*, 103 Mass. 510. But see *Dublin etc. R. Co. v. Slaterry*, 3 App. Cas. 1155.

⁴ *Klein v. Jewett*, 26 N. J. Eq. 474; *Chicago etc. R. Co. v. Wilson*, 63 Ill. 167; *Armstrong v. New York etc. R. Co.*, 66 Barb. 437.

⁵ *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; s. c. 37 Pa. St. 420; *Bancroft v. Boston etc. R. Co.*, 97 Mass. 275; *Gonzales v. New York etc. R. Co.*, 50 How. Pr. 126.

⁶ 8 Allen, 227.

Notes.

station-agent said to him, "The train is coming, — we will cross over," and he attempted to follow him, for the purpose of taking his seat in the train (which meanwhile had arrived), and, in crossing a track for that purpose, was struck by another train, coming from the other direction and partially behind him, which he did not look for or see until too late to save himself.¹ In *Gaynor v. Old Colony, etc. Railroad Company*² the same court said: "No one can be said to be in the exercise of due care who places himself upon a railroad track without the assurance, from actual observation, that there is no approaching train. But the degree of caution which he must exercise in crossing will be affected always by the circumstances of the time and place. He has a right to rely to some extent upon proper precautions and the usual signals of warning, to be given by an engine or train passing a station where passengers are leaving another train upon its fresh arrival."³

Circumstances of paramount necessity, however, will justify a passenger in leaving the train in a manner other than that provided by the company, — as, where the station of the plaintiff was not announced, and the train stopped but a short time, necessitating great haste on the part of the plaintiff in getting off the train after she had ascertained that she had reached her destination, whereby she got off upon the wrong side, and, coming upon a parallel track, was injured by an express train which drove past at great speed.⁴

Although it is the duty of the railroad company to have its trains safely and conveniently accessible to persons intending to take them, yet this will not justify a passenger who finds a freight-train, with steam up and blocking the way, in crawling through or under it without permission of or notice to any one in charge of this train.⁵

§ 5. **Passenger laboring under a Disability.** — It is consistent not only with common humanity, but with the legal obligations of the carrier, that if a passenger is known to be in any manner affected by a disability, physically or mentally, whereby the hazards of travel are increased, a degree of attention should be bestowed to his safety beyond that of an ordinary passenger, in proportion to the liability to injury from the want of it.⁶ But in order that the

¹ See also *Mayo v. Boston etc. R. Co.*, 104 Mass. 137. ² 100 Mass. 208, 213.

³ To the same effect see *Chaffee v. Boston etc. R. Co.*, 104 Mass. 108; *Wheelock v. Boston etc. R. Co.*, 105 Mass. 203.

⁴ *Keller v. New York etc. R. Co.*, 24 How. Pr. 172; *Dickens v. New York etc. R. Co.*, 1 Abb. App. Dec. 504.

⁵ *Chicago etc. R. Co. v. Coss*, 73 Ill. 394; *Chicago etc. R. Co. v. Dewey*, 26 Ill. 255. Where a person about to take passage on a train, having first looked up and down the track and seen no car in motion, but a locomotive standing far away, crawled between two freight-cars which belonged to a train with no locomotive attached, and while in such position was injured by cars being propelled against the end of the train, in the process of making it up, it was held that the conduct of the injured person could not be

said to be negligence in law, but that under all the circumstances her negligence was a question for the jury. *Allender v. Chicago etc. R. Co.*, 37 Iowa, 264.

⁶ *Sheridan v. Brooklyn City R. Co.*, 36 N. Y. 39; s. c. 34 How. Pr. 217; *Giles v. Great Western R. Co.*, 36 Upper Canada Q. B. 360, 369; *Pittsburgh etc. R. Co. v. McClurg*, 56 Pa. St. 294; *Columbus etc. R. Co. v. Powell*, 40 Ind. 37. But see *New Orleans etc. R. Co. v. Statham*, 42 Miss. 607, where certain statements are made by the court which derive no support from authority in general, as for example: "All assistance that a conductor may extend to ladies without escorts, or with children, or to persons who are sick, and ask his assistance in getting on and off trains, is purely a matter of courtesy, and not at all incumbent upon him in the line of his public duty."

Lunatics — Intoxicated Persons.

carrier may be invested with this duty, it is necessary that the condition and wants of the passenger in this respect should be made known to him or his servants.¹

This is well illustrated by a frequently cited case. In *Willetts v. Buffalo, etc. Railroad Company*,² the facts were that a lunatic was travelling upon a train in company with his father, who had procured tickets for both. The father got out at a way-station to procure refreshments, leaving his son in the cars without giving notice to any one of his condition. During the absence of the father, the son changed his seat. After the train started, the father having not yet found his son or given notice that he was missing, the conductor, in the absence of the former, applied to the latter for his ticket. The lunatic handed the conductor the card of a public-house. On being threatened with expulsion from the train if he did not pay his fare, he produced another hotel-ticket; whereupon he was gently put off the train, after slight resistance, saying, as he left, that "Judge Miller" had paid his fare, or would pay it. The strange conduct of the passenger, and a wild stare by him as he stood on the ground, induced a person who assisted the conductor in putting him off to inquire whether there was any thing the matter with the man; to which the conductor replied that he was "one of the stubborn kind." Subsequently to this occurrence, and in ignorance of it, the father of the lunatic made inquiries of the conductor in regard to his son, and ascertained that he had been put off the train. Every facility was afforded the father, by the conductor of this and other trains, for finding him again; but the lunatic, having got upon the track, was run over and killed by another train, several hours later, in the night-time, under circumstances which exonerated the company from every imputation of negligence as to this occurrence. The court held that no part of the conduct of the deceased furnished sufficient evidence of insanity to put the conductor on his guard, and that therefore no recovery could be had against the company by the personal representative.

The fact that a passenger is intoxicated does not absolve the carrier from the duty of exercising the same care for his safety as for that of other passengers, although this circumstance may be shown as indicating contributory negligence in case of injury received by him.³ Indeed, it is properly held that it is the duty of the carrier's servants under such circumstances, when aware of the intoxication of the passenger, to give him that degree of attention which considerations for his safety demand, beyond that ordinarily bestowed upon passengers.⁴

Whenever a passenger can remedy the derangement or loss of one faculty by a more than ordinarily diligent use of another, it is his duty to do so. Thus, a

¹ *Willetts v. Buffalo etc. R. Co.*, 14 Barb. 585; *Toledo etc. R. Co. v. Baddeley*, 54 Ill. 19; *New Orleans etc. R. Co. v. Statham*, 42 Miss. 607.

² 14 Barb. 585.

³ *Milliman v. New York etc. R. Co.*, 6 Thomp. & C. 585; *s. c.* 66 N. Y. 642; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Whalen v. St. Louis etc. R. Co.*, 60 Mo. 323.

⁴ *Giles v. Great Western R. Co.*, 36 Upper Canada Q. B. 360; *Haley v. Chicago etc. R. Co.*, 21 Iowa, 15, 23. Upon the general subject of intoxication as an element of con-

tributory negligence, see *Wynn v. Allard*, 5 Watts & S. 524; *Chicago etc. R. Co. v. Bell*, 70 Ill. 102; *Toledo etc. R. Co. v. Riley*, 47 Ill. 514; *Baltimore etc. R. Co. v. Boteler*, 38 Md. 563; *Healy v. New York*, 3 Hun, 708; *Ditchett v. Spuyten Duyvil etc. R. Co.*, 5 Hun, 165; *Alger v. Lowell*, 3 Allen, 402; *Stuart v. Machias Port*, 48 Me. 477; *Cramer v. Burlington*, 42 Iowa, 315; *Burns v. Elba*, 32 Wis. 605; *Thorp v. Brookfield*, 36 Conn. 321; *O'Hagan v. Dillon*, 10 Jones & Sp. 456; *Robinson v. Pioche*, 5 Cal. 460.

Notes.

person very short-sighted is materially assisted in many situations by listening very attentively; therefore it cannot be urged as a circumstance excusing a passenger in getting off a train upon a railroad track alongside, that by reason of his short-sightedness he could not have seen an approaching train by which he was killed, even if he had looked up and down the track for this purpose (a precaution which the law imperatively demands). The passenger in such a situation should either listen for the train, or, more properly yet, get out upon the platform on the other side, designed for the reception of passengers.¹

In case of negligent management of a railroad train, it will be no excuse for the company that the impaired faculties of the passenger materially contributed to the injuries received in consequence of its negligence.²

¹ *Gonzales v. New York etc. R. Co.*, 50
Iow. Pr. 126.

7 H. L. 213 (reversing *s. c. L. R. 6 Q. P.*
377); *Patten v. Chicago etc. R. Co.*, 32 Wis.

² *Bridges v. London etc. R. Co.*, L. R.

524.

CHAPTER VII.

APPLICATIONS OF THE DOCTRINE OF IMPUTED NEGLIGENCE IN THE CARRIAGE OF PASSENGERS.

LEADING CASES: 1. *Thorogood v. Bryan*. — The passenger upon the vehicle of a common carrier chargeable with the negligence of such carrier, as regards third persons.

2. *Bennett v. New Jersey Railroad and Transportation Company*. — This doctrine denied.

NOTES: § 1. Imputed negligence — Proper scope of the rule.

2. *Thorogood v. Bryan* doubted.

3. *Thorogood v. Bryan* not followed.

4. The principle of *Thorogood v. Bryan* subsequently reasserted.

5. American authority upon this subject.

6. Negligence of a stranger concurring with negligence of the carrier, to injury of passenger.

7. Children and persons of unsound mind as passengers.

8. Other cases illustrative of the rule.

1. PASSENGER CHARGEABLE WITH THE CARRIER'S NEGLIGENCE AS REGARDS THIRD PERSONS.

THOROGOOD *v.* BRYAN.*

English Court of Common Pleas, 1849.

The Right Hon. Sir THOMAS WILDE, Kt., *Lord Chief Justice.*

Sir THOMAS COLTMAN, Kt.,

“ WILLIAM HENRY MAULE, Kt.,

“ CRESSWELL CRESSWELL, Kt.,

“ EDWARD VAUGHAN WILLIAMS, Kt.,

“ THOMAS NOON TALFOURD, Kt.,

} *Justices.*

A passenger upon the vehicle of a common carrier, who sustains an injury which is the result of the concurrent negligence of those in charge of such vehicle and third persons, is so identified with the former as to be chargeable with their negligence, in an action against the latter, and therefore entitled only to recover damages from his carrier.

* Reported, 8 C. B. 114, 129. The editor has not deemed it necessary to present the case of *Catlin v. Hills*, involving the same principle as this case, which was argued and reported in connection with it, as that case was compromised upon the basis of the opinion in this case, no opinion being delivered therein. For a statement of the facts in that case, see *post*, § 2.

Thorogood v. Bryan.

THIS was an action upon the case brought by the plaintiff, Sarah Thorogood, as administratrix of her late husband, Charles Abraham Thorogood, under the statute 10 Vict., c. 93, to recover damages against the defendant for negligently causing the intestate's death.

The declaration stated that Charles Abraham Thorogood, in his lifetime, and before the committing of the grievances thereafter mentioned, was lawfully passing along a certain public highway; that the defendant, at the time of the committing of the grievance, was possessed of a certain carriage called an omnibus, and of two horses then drawing the same along the said highway, which said carriage and horses were under the care and direction of a certain servant of the defendant; yet that the defendant, after the passing of a certain act of Parliament, made and passed, etc., intituled "An act to compensate the families of persons killed by accident," to wit, on, etc., by her said servant, so carelessly drove and directed the said carriage and horses, that by the negligence and improper conduct of the defendant, by her said servant in that behalf, they ran against the said Charles Abraham Thorogood, so then lawfully passing along the said highway, and knocked him down and passed over him, and thereby greatly crushed and injured him; and by reason of the premises the said Charles Abraham Thorogood, within twelve calendar months next before the commencement of the suit, to wit, on, etc., died, leaving him surviving the plaintiff, who, at the time of his death, was his wife, and John, Sarah, Esther, and Emma, his children, etc.

The defendant pleaded not guilty, whereupon issue was joined.

The cause was tried before V. WILLIAMS, J., at the Sittings in Middlesex, after Trinity Term, 1848. The facts that appeared in evidence were as follows: On the 3d of January, 1848, Charles Abraham Thorogood, the husband of the plaintiff (whose administratrix she was), was a passenger in an omnibus belonging to one Barber, in which he was proceeding toward Clapton about eight o'clock in the evening. The defendant, Mrs. Bryan, was the proprietress of another omnibus running on the same line of road. Both vehicles had started together, and frequently passed each other as either stopped to take up or set down a passenger. The deceased, wishing to alight, did not wait for the omnibus to draw up at the curb, but got out whilst it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, the deceased was unable to get out of the way, and was knocked down and run over, and seven days afterwards died of the injuries he so sustained.

On the part of the defendant it was submitted, upon the authority

English Court of Common Pleas.

of *Butterfield v. Forrester*¹ and *Bridge v. The Grand Junction Railway Company*,² that the plaintiff was not entitled to recover, inasmuch as the evidence showed that the accident was at least in part occasioned by the negligence of the driver of Barber's omnibus, in permitting a passenger to alight without drawing up at the curb and whilst the vehicle was in motion, and by want of care and caution on the part of the deceased himself.

The learned judge told the jury, that, if they were of opinion that the injuries sustained by the deceased were purely the result of accident, they must find for the defendant; and he further told them, that, if they were of opinion that want of care on the part of the driver of Barber's omnibus in not drawing up to the curb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases—notwithstanding the defendant (by her servant) had been guilty of negligence—their verdict must be for the defendant.

The jury returned a verdict for the defendant.

Humphrey, in Trinity Term, 1848, obtained a rule *nisi* for a new trial, on the ground of misdirection. He submitted that the ruling of the learned judge would necessarily lead to this absurd result: that a passenger who is injured by a collision between two omnibuses has no remedy against the proprietor of either, if the drivers of both are guilty of negligence or improper conduct. And he cited *Lynch v. Nurdin*,³ *Pluckwell v. Wilson*,⁴ and *Luxford v. Large*.⁵

Talfourd, Serjt., now showed cause. The direction of the learned judge was perfectly correct. The true principle which governs these cases is to be found in the statement of the cause of action in the declaration, which, in substance, is, that the injury was the result solely of negligence and improper conduct on the part of the defendant's servant. The question is, whether the injury of which the plaintiff complains proceeded from negligence on the part of the defendant, or from something over which the defendant had no control. Many cases might be put, in which a party, though himself in fault, might still be entitled to compensation for damage sustained through another's negligence. For instance, suppose a drunken man lying in a carriage-way, and a carriage, recklessly driven along the road, passed over and injured him,—the inebriety of the plaintiff would be no defence to an action. The true inquiry is, whether the injury complained of is fairly attrib-

¹ 11 East, 60.

² 3 Mee. & W. 244; s. c. *sub nom.* Armitage v. Grand Junction R. Co., 6 Dowl. P. C. 340.

³ 1 Q. B. 29; s. c. 4 Per. & Dav. 672.

⁴ 5 Car. & P. 375.

⁵ 5 *id.* 421.

Thorogood v. Bryan.

tible to the wrongful act of the defendant. *Butterfield v. Forrester* was the first case in which this doctrine was discussed. It was there held that one who is injured by an obstruction in the highway, against which he fell, cannot maintain an action if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. "A party," says Lord ELLENBOROUGH, "is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right." [V. WILLIAMS, J. — The objection to the summing up applies to that part of it which relates to the want of care and caution on the part of the driver of Barber's omnibus. I acted upon the *dictum* of the Court of Exchequer in *Bridge v. The Grand Junction Railway Company*. If that be correct, I was right.] That was an action upon the case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of the carriages of which the plaintiff was, and injured him. The defendants pleaded that the parties having the management of the train in which the plaintiff was, managed it so negligently and improperly that, *in part* by their negligence, the defendant's train ran against the other, and caused the injuries to the plaintiff. The court held the plea bad, both in form and in substance. And PARKE, B., says: "The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*, and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind." That case is followed by *Davies v. Mann*.¹ There, the defendant negligently drove his horses and wagon against and killed an ass, which had been left in the highway fettered in the fore feet, and thus unable to get out of the way of the wagon, which was going at a "smartish" pace along the road; and it was held that the jury were properly directed that, although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover. And PARKE, B., said: "This subject was fully considered by this court in *Bridge v. The Grand Junction Railway Company*, where, as appears to me, the correct rule is laid down concerning negligence, viz., that the negligence which

¹ 10 Mee. & W. 546.

is to preclude a plaintiff from recovering in an action of this nature must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. In that case, there was a plea imputing negligence on both sides: here, it is otherwise; and the judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." [CRESSWELL, J. — Must not the negligence which is to exonerate the defendant be negligence of the *plaintiff*, or of *his agent*?] It is submitted not; at all events, the driver of the omnibus in which the deceased was a passenger must be taken to be his agent. [CRESSWELL, J. — Suppose two omnibuses are racing, and one of them runs over a man who is crossing the road and has not time to get out of the way, has not the injured party a remedy against the proprietor of either omnibus?] No doubt he has. [CRESSWELL, J. — It seems strange to say that A. shall not be responsible for his negligence because B. has been negligent likewise, C. being the party injured. The principle of *Butterfield v. Forrester* is, that one who receives an injury from the negligent act of another, shall not have an action if by the exercise of ordinary care he might have escaped the injury.] It is not necessary in this case to contend for a proposition so wide as that suggested. The point did not arise in *Bridge v. Grand Junction Railway Company*. [CRESSWELL, J. — It could not; the plea amounted to not guilty, or nothing.]

Humphrey (with whom was *Cobbett*), in support of the rule. — *Bridge v. The Grand Junction Railway Company* does not apply. It was enough there to decide that the plea was bad in point of form; but the court go on to say, unnecessarily, that it is also bad in substance. Adopting the suggestion of PARKE, B., in that case, the learned judge upon this occasion told the jury, that if, in their opinion, the accident might have been avoided by the exercise of ordinary care on the part of the deceased, or of the driver of the omnibus in which he was, the defendant

Thorogood v. Bryan.

was entitled to their verdict. [CRESSWELL, J. — It appears that the deceased got out whilst the omnibus was moving; and, consequently, he had not sufficient command of his legs to be able to get out of the way of the defendant's omnibus, the driver of which could not reasonably be expected to be prepared for such a state of things.] If the fact were so, no ordinary care on Thorogood's part could have saved him. [CRESSWELL, J. — What degree of caution could have enabled the driver of Barber's omnibus to avoid the accident?] It is enough to show that there might be a state of things which makes the direction wrong. We may assume that the deceased was in the right, and the drivers of both omnibuses wrong. [CRESSWELL, J. — Wrong in what?] *In omnibus.* It would be monstrous to say that the plaintiff is without remedy against either party. Put the case of a passenger on board a steamboat, sitting in a place appropriated for passengers, and getting his leg broken by another steamboat coming in collision with them, — what remedy would he have against the proprietors of the boat he was on board of? [V. WILLIAMS, J. — A coachman is responsible to his master for the due management of the carriage in which he is driven by him. Suppose the master injured by the coachman's want of care, though by an accident which would not have happened but for the want of proper care on the part of a third person, — would the coachman be liable?] It is submitted that he would. The rule as laid down in *Butterfield v. Forrester*, and followed in *Bridge v. The Grand Junction Railway Company* and *Davies v. Mann*, is not so large as the summing up in this case assumes. The negligence, to operate an excuse, must be negligence in the particular thing which leads to the accident.

The court, before pronouncing judgment in this case, desired to hear the argument of *Catlin v. Hills*, a case involving very much the same question.

Cur. adv. vult.

[Omitting the statement of facts in the case of *Catlin v. Hills*, which was compromised, no judgment being rendered in it.]

COLTMAN, J. — The case of *Thorogood v. Bryan* seems distinctly to raise the question whether a passenger in an omnibus is to be considered so far identified with the owner that the negligence on the part of the owner, or his servant, is to be considered negligence of the passenger himself. As I understand the law upon this subject, it is this: that a party who sustains an injury from the careless or negligent driving of another may maintain an action, unless he has himself been guilty of such negligence or want of due care as to have contributed or conduced to the injury. In the present case, the negligence that is relied on as

English Court of Common Pleas.

an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me, that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that, if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury. That being so, the summing up in this case — which is in accordance with the opinion expressed by the Court of Exchequer in *Bridge v. The Grand Junction Railway Company*, though not in terms with the decision of that case — was correct. I therefore think the verdict should stand undisturbed.

MAULE, J. — I agree with my brother COLTMAN in thinking that the rule in *Thorogood v. Bryan* ought to be discharged. This is an action brought to recover damages against an omnibus proprietor, for negligently causing the death of the plaintiff's husband by knocking him down and driving over him, as he had just alighted from another omnibus. My brother WILLIAMS, in leaving the case to the jury, told them, that, if they should be of opinion that the occurrence was purely accidental, or that the deceased, or the driver of the omnibus by which he was carried, had by any negligence or want of care on their part contributed to the accident, they must find for the defendant. The jury having, upon that direction, found for the defendant, it must be assumed that they found that there had been negligence on the part of the driver of the omnibus in which he was a passenger. This case is an important one, inasmuch as it is in some degree novel, though somewhat similar in principle to *Bridge v. The Grand Junction Railway Company*, where, in a case against a railway company for the negligent management of a train, whereby it ran against another train, in which the plaintiff was a passenger, and injured him, a plea that the persons having the management of the train in which the plaintiff was, managed it so negligently and improperly that, *in part* by *their* negligence, the defendant's train did the mischief, was held bad. The Court of Exchequer there seem to have thought (though it was not necessary to decide it) that where there is negligence on both sides, the action cannot be maintained. Although I at one time entertained a contrary impression, upon further consideration I incline to think that for this purpose the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased. If the

Thorogood v. Bryan.

deceased himself had been driving, the case would have been quite free from doubt. So, there could have been no doubt had the driver been employed to drive him, and no one else. On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. According to the terms of his contract, he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey. It is somewhat remarkable that actions of this sort are almost invariably brought against the rival carriage or vessel, which is only to be accounted for by that party spirit which more or less enters into every transaction of life. If there is negligence on the part of those who have contracted to carry the passengers, those who are injured have a clear and undoubted remedy against them. But it seems strange to say, that, although the defendant would not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he still would be responsible for an injury done to a passenger. The passenger is not without remedy. But, as regards the present defendant, he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default of the driver whom he thought fit to trust. For these reasons, it seems to me that the direction of my brother WILLIAMS was quite correct, and that the rule should be discharged.

CRESSWELL, J. — I am of the same opinion. I must own I should not have been sorry if the point could have been raised upon a bill of exceptions. The subject is an important one, and ought to be definitively set at rest. I incline to think that the opinion thrown out by the Court of Exchequer in *Bridge v. The Grand Junction Railway Company* is the correct one. If the driver of the omnibus the deceased was in had by his negligence or want of due care and skill contributed to any injury from a collision, his master clearly could maintain no action; and I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position. For these reasons, I think that the plaintiff in this case was not entitled to recover.

V. WILLIAMS, J. — I am of the same opinion. I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by.

Rule discharged.

Supreme Court of New Jersey.

2. THIS DOCTRINE DENIED.

BENNETT *v.* NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY.**Supreme Court of New Jersey, 1873.*HON. MORCER BEASLEY, *Chief Justice.*

" JOSEPH D. BEDLE,	} <i>Judges</i>
" VANCLEVE DALRIMPLE,	
" GEORGE S. WOODHULL,†	
" DAVID A. DEPUE,	
" BENNET VAN SYCKLE,†	
" EDWARD W. SCUDDER,†	

1. *Thorogood v. Bryan* denied. — The driver of a street car is not the agent of a passenger thereon, so as to render such passenger chargeable with the negligence of such driver.
2. *Case in Judgment.* — Where a passenger on a street car is injured by the carelessness of the engineer of a railroad company in the management of a locomotive, it is no defence that there was contributory negligence in the driver of the street car.

ON rule to show cause, etc. Argued at February Term, 1873, before BEASLEY, C. J., and Justices BEDLE, DALRIMPLE, and DEPUE.

Leon Abbett, for plaintiff; *J. W. Scudder*, for defendants.

The opinion of the court was delivered by —

BEASLEY, C. J. — The cars of the Jersey City and Bergen Railroad Company, in crossing the track of the defendants, the New Jersey Railroad and Transportation Company, were struck by the locomotive of the latter company. At the time of this occurrence the plaintiff was a passenger in the horse-car, and was considerably injured by the collision. The jury found the servants of the defendants in fault, and gave the plaintiff \$5,000 damages. The case stands before this court on a motion for a new trial, founded on two grounds: first, for a misdirection in matter of law at the circuit; and, second, because the damages are excessive.

The question of law then presented is this: the defendants, at the trial, contended that there was evidence tending to show negligence in the servants of the horse-car company, which negligence was, in part, productive of the accident, and requested the judge who presided to charge the jury that if this was so, the plaintiff was not entitled to

* Reported, 36 N. J. L. 225.

† Not sitting in this case.

Bennett v. New Jersey Railroad and Transportation Company.

recover. The proposition claimed to be law is, that when a passenger enters a public conveyance he in some sort becomes affected by the negligence of the agents of those in charge of such conveyance, at least to the extent of debarring him from suits against third parties for injuries occasioned by the joint carelessness of such third parties and that of the servants having the control of the vehicle in which he is riding.

This position has for its support the case of *Thorogood v. Bryan*.¹ The authority is in every respect in point. The suit was by the representatives of a person who had been run over and killed. The deceased was a passenger in an omnibus, and in getting out had been run over by the omnibus of the defendant. The judge trying the cause charged the jury, that, if any want of care on the part of the driver of the omnibus in which the deceased was a traveller had been conducive to the injury, their verdict must be for the defendant. The ruling was approved of by the court *in banc*.

This case stands, I think, in point of principle, alone in the line of English decisions, and the grounds upon which it rests seem to me inconsistent with familiar rules. The reason given for the judgment is, that a passenger in the omnibus "must be considered as identified with the driver of the omnibus in which he voluntarily" becomes a passenger, and that the negligence of the driver is the negligence of the passenger. But I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could result only in one way: that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious, in a suit against the proprietor of the car in

¹ 8 C. B. 116; s. c. *ante*, p. 273.

which he was a passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor; because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes. And yet it is to be presumed that no court would go this length, and impose on each person being carried by a railroad train responsibility for the misconduct of the engineer or conductor of such train. The doctrine of the English case appears to convert the driver of the omnibus into the servant of the passenger for the single purpose of preventing the passenger from bringing suit against a third party, whose negligence has coöperated with that of the driver in the production of the injury. I am compelled to dissent from such a proposition. Under the circumstances in question, the passenger is a perfectly innocent party, having no control over either of the wrong-doers; and I can see no reason why, according to the usual rule, an action will not lie in his behalf against either or both of the employers of such wrong-doers.

Nor do I think that in the English courts it is considered that the case of *Thorogood v. Bryan* has settled the rule of law.

The question involved in it was decided on a rule to show cause, a circumstance which was regretted by one of the judges, who said that the subject was an important one and ought to be definitively set at rest. The case itself was disparagingly criticised in the fourth edition of *Smith's Leading Cases*;¹ and this criticism has, on two occasions at least, been referred to by the English courts with marked respect.² From these considerations, this case does not bear the weight which a deliberate decision of the Court of King's Bench ordinarily carries with it. The doctrine of the case has, however, been adopted in Pennsylvania,³ but has been repudiated in New York.⁴

The result is, that in the present case the jury was rightly instructed that the carelessness of the driver of the street car in which the plaintiff was a passenger could not affect the suit, or bar the plaintiff's right to recover for the negligence of the defendant.

Rule discharged.

¹ Vol. I., p. 220.

² *Tuff v. Warman*, 2 C. B. (N. S.) 750;
Waite v. North-Eastern R. Co., El. Bl. &
El. 723.

³ *Lockhart v. Lichtenthaler*, 46 Pa. St. 152.

⁴ *Chapman v. New Haven R. Co.*, 19 N. Y.
341; *Webster v. Hudson etc. R. Co.*, 38 N. Y.
260.

Notes.

NOTES.

§ 1. *Imputed Negligence—Proper Scope of the Rule.*—The reasonableness of the rule of imputed negligence will hardly be questioned where the person to whom the negligence of another is imputed has control, management, or advisory power over the conduct of such negligent person;¹ or where, from the necessity of the case, such negligent person is by lawful authority vested with the control and direction of the movements of the person to whom his negligence is imputed;² or where the plaintiff sues in a representative capacity for injuries causing the death of his negligent intestate;³ or where the plaintiff sues for the loss of services, etc., of the negligent and injured person;⁴ or where the plaintiff has intrusted his chattel to another, whose negligence concurs with that of the defendant in producing an injury to it. To illustrate: The owner of a horse, who lends him without hire, cannot recover for his death in consequence of an unsafe roadway, if the negligence of the borrower contributed to the accident.⁵ Neither can the owner of a wagon recover for an injury done to his vehicle by colliding with another, if his driver's want of ordinary care contributed to produce the collision.⁶ So, where the plaintiff, pursuant to a contract, furnished a person a team to be used in farming the lands of the former for the joint benefit of the parties, and such person, while so using the team, carelessly left it unfastened while he voluntarily engaged in a personal encounter with a third person, near to the horses, by which circumstance the team became frightened and ran off, and one was killed, it was held that the want of care on the part of the custodian of the animals, being a proximate cause of the injury, would prevent a recovery therefor in an action by the owner against such third person.⁷

§ 2. *Thorogood v. Bryan* doubted.—It is not perceived that this rule can, with any degree of justice or reason, be extended beyond the limits just indicated. It seems scarcely to admit of doubt that the application which the rule received in the case of *Thorogood v. Bryan*⁸ is open to criticism and to positive objection. It was in this case that the rule was first announced (though previously hinted at⁹) in unqualified form, that a passenger is so far identified with the carrier and his servants, that if any injury results from their negligence, he must be considered a party to it, and accordingly disentitled to recover. It is seldom that a rule of law is declared, so palpably fraught with injustice and so easily demonstrable to be fallacious, or arbitrary and anomalous. The strong common-sense of at

¹ *Chapman v. New Haven R. Co.*, 19 N. Y. 341, 344.

² *Waite v. North-Eastern R. Co.*, El. Bl. & El. 719; 2 *Thomp. on Neg.*, p. 1182, § 32 *et seq.*

³ 2 *Thomp. on Neg.*, p. 1279, § 80.

⁴ *Cleveland etc. R. Co. v. Terry*, 8 Ohio St. 570; *Bellefontaine etc. R. Co. v. Snyder*, 24 Ohio St. 670.

⁵ *Forks Township v. King*, 84 Pa. St. 230.

⁶ *Mabley v. Kittleberger*, 37 Mich. 360. See also *Smith v. Smith*, 2 Pick. 621.

⁷ *Puterbaugh v. Reasor*, 8 Ohio St. 484. See also *Stiles v. Geesey*, 71 Pa. St. 439.

⁸ *Ante*, p. 273.

⁹ *Bridge v. Grand Junction R. Co.*, 3 Mee. & W. 244. See also *Vanderplank v. Miller*, Moo. & M. 169.

 Thorogood v. Bryan not followed.

least one English judge has more than once led him to suggest that the case ought not to be regarded as binding authority. In the course of the argument of *Tuff v. Warman* in the Court of Common Pleas, when this case was cited by counsel, WILLIAMS, J., interrupted the argument by saying, "That case has been made the subject of some damaging remarks in the last edition of *Smith's Leading Cases*."¹ Again, in the argument of *Waite v. North-Eastern Railway Company* in the Exchequer Chamber, under similar circumstances he made substantially the same observation.²

Dr. LUSHINGTON, Judge of the High Court of Admiralty, in the course of an opinion,³ thus remarked upon this case: "The case of *Thorogood v. Bryan*, it is said, has laid down a rule to the contrary. With due respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case; because I know, upon inquiry, that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and lastly, because it is directly against *Hay v. Le Neve*,⁴ and the ordinary practice of the Court of Admiralty."

§ 3. *Thorogood v. Bryan* not followed.—In addition to the foregoing expressions of disapproval of *Thorogood v. Bryan*, there are two other English cases, determined the year following, which show that the principle of this case had not then taken a very firm root in the judicial mind. In *Rigby v. Hewitt*,⁵ it appeared that the plaintiff was a passenger on the outside of an omnibus, which, just before the accident, had started from the same place as the defendant's omnibus, and at the same time. The drivers were competing for passengers, each endeavoring to secure the lead; and while the omnibuses were going at great speed, in trying to avoid a cart which was in the way, the wheel of the defendant's omnibus came in contact with a projecting step of the omnibus on which the plaintiff was riding, which caused the latter to swing towards the curbstone. The speed with which it was going rendered it impossible for the driver to pull up. The seat on which the plaintiff sat struck against a lamp-post, and he was

¹ 2 C. B. (N. S.) 750. The remarks to which the learned judge made reference are found in a note to *Ashby v. White*, in the sixth American edition of *Smith's Leading Cases*, in Vol. I., at p. 450. They are as follows: "If two drunken stage-coachmen were to drive their respective carriages against each other, and injure the passengers, each would have to bear the injury to his own carriage, no doubt; but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them so, as to be restricted for remedy to actions against their own driver or his employer. This, nevertheless, appears to be the result of the decision in *Thorogood v. Bryan*, 8 C. B. 115; but it may be questioned whether the rea-

soning of the court in that case is consistent with those of *Rigby v. Hewitt*, 5 Exch. 240, and *Greenland v. Chaplin*, 5 Exch. 243, or with the series of decisions from *Quarman v. Burnett*, 6 Mee. & W. 599, to *Reedie v. London etc. R. Co.*, 4 Exch. 244, and *Dalyell v. Tyrer*, 28 L. J. (Q. B.) 52. Why in this particular case both wrong-doers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it received in *Thorogood v. Bryan*."

² El. Bl. & El. 728.

³ *The Milan*, 1 Lush. 388, 403.

⁴ 2 Shaw's Sc. App. 405.

⁵ 5 Exch. 240.

Notes.

thrown off. The learned judge told the jury that the plaintiff was not disentitled to recover merely because the omnibus on which he sat was driven at a furious rate, and that if the jury thought that the collision took place from the negligence of the driver of the defendant's omnibus, *and that the other omnibus was not in fault in not endeavoring to avoid the accident,*¹ then the defendant was liable. The jury having found for the plaintiff, the counsel for the defendant moved for a new trial, on the ground of misdirection. The Court of Exchequer decided that there was no fault to be found with the direction of the trial judge.

Again, in *Greenland v. Chaplin*² the rule was not applied. In this case, the plaintiff was a passenger on a steamboat called the Sons of the Thames. The defendant's steamboat, called the Bachelor, struck the first-named vessel on the bow, where its anchor was carried, which being thereby dislodged, fell upon and broke the plaintiff's leg.³ POLLOCK, C. B., told the jury, that, if they were of opinion that the collision was owing to the bad navigation of the Bachelor, they should find a verdict for the plaintiff; but if they thought that there was any negligence, either *in the stowage of the anchor* or in the plaintiff putting himself in the place where he was on board the Sons of the Thames, they should find for the defendant. The jury having found a verdict for the plaintiff, the counsel for the defendant obtained a rule *nisi* to set aside the verdict, as against the evidence, no objection being taken to the mode in which the question was left to the jury. In the Court of Exchequer, POLLOCK, C. B., expressed the judgment of all the judges in saying that the verdict of the jury was satisfactory. A portion of his opinion is quite noteworthy. He said: "My brother *Shee* contended that the accident in part arose from the negligent stowage of the anchor, and from the plaintiff being in a part of the vessel where he ought not to have been. But the jury negatived both these propositions, and found a verdict for the plaintiff, notwithstanding I told them, *no doubt incorrectly*, that, if they thought either that there was negligence in the stowage of the anchor, or that the accident

¹ This language we have italicized to show how slight was the regard paid to the strict rule of *Thorogood v. Bryan*. Here are two persons driving madly through a frequented thoroughfare, in a race for patronage. Such conduct, it cannot be doubted, constitutes, not merely negligence, but that in a most reprehensible degree. Therefore, had the trial judge intended to follow the rule of *Thorogood v. Bryan*, the plaintiff would have been nonsuited from this circumstance, and the defendant's liability would not have been made to depend upon the mere contingency whether the omnibus upon which the plaintiff rode was in fault in not endeavoring to avoid the accident.

² 5 Exch. 243.

³ The striking similarity between the facts of this case and those of *Cattlin v. Hills* (a case heard at the same time with *Thorogood v. Bryan*, because it involved very much the same question) ought not to escape atten-

tion. The plaintiff was a passenger upon a vessel called the Sons of the Thames. The defendant's vessel, called the Sapphire, rubbed against the Sons of the Thames, and coming in contact with the anchor of the latter, which projected a little over her larboard bow, knocked it down upon the plaintiff's leg, and so crushed it as to render amputation necessary. There was contradictory evidence as to whether or not the anchor on board the Sons of the Thames was properly stowed, the defendants contending that it ought to have been lashed, in which case the accident could not have happened. A verdict having been rendered for the plaintiff in this case, a motion was made for a new trial, and cause was shown; but the judgment of the court upon the case was never delivered, as the parties agreed to a compromise immediately upon the decision of the case of *Thorogood v. Bryan*. See 8 C. B. 133.

 Thorogood v. Bryan reasserted.

arose from the plaintiff being in a part of the vessel where he ought not to have been, they ought to find for the defendant.¹ This language, it is unnecessary to remark, shows a thorough abandonment of the principle of *Thorogood v. Bryan*.

§ 4. **The Principle of Thorogood v. Bryan subsequently reasserted.**—Notwithstanding the disparagement with which *Thorogood v. Bryan* has been often treated, the effect of at least two comparatively recent decisions must be such as to bolster up its tottering authority, and render it at the present time an accurate expression of the law of England upon this subject. In a case decided as late as the year 1875,² the facts were these: The plaintiff, an employee of a railroad company, was travelling in one of its trains over the defendants' road. The train ran past an adverse danger-signal, and into some trucks that were being switched on the line by the defendants' servants. The plaintiff was hurt in the collision. On the trial, the jury found that there was negligence, both on the part of the servants in switching the trucks, and of the engineer of the train in which the plaintiff was riding in running past the danger-signal. The court held that it was impossible to distinguish this case from *Thorogood v. Bryan*; and said BRAMWELL, B., "I am prepared to decide this case upon the authority of *Thorogood v. Bryan*, which has never been overruled." He thought, however, that there was another principle upon which the case ought to be decided adversely to the plaintiff. The plaintiff, although not engaged in the management of the train upon which he was riding, was nevertheless a servant of the company owning the train, the negligence of whose servants had contributed to the occurrence of the accident, and therefore could not maintain any action against the company in whose employ he was. For this reason the learned baron seems to have considered the plaintiff to have been peculiarly "*identified*" with those engaged in the operation of the train.

Such a consideration as this appears, indeed, to have been the basis of a decision by this same court, less than a year previous,³ in a case where it appeared that the defendant was guilty of negligence in failing to restrain his pigs from roaming at large, in consequence of which neglect, concurring with the failure of a railroad company to comply with the statutory regulation requiring it to keep its track securely fenced, the animals got upon the line of the railroad. At the moment they appeared upon the track, the plaintiff, a track-repairer in the service of the railway company, was passing upon a hand-car, in company with fellow-workmen returning from work upon the line. The car, running over two of the pigs, was upset, and the plaintiff's leg was broken. In an action by the plaintiff against the owner of the animals, after a verdict for the plaintiff, a rule to enter a nonsuit was made absolute in the Court of Exchequer. The ground of the decision is apparent from the language of BRAMWELL, B.:⁴ "What might happen if one of the public were injured in the use of the railway, which is a public highway, I will not say. The defendant might perhaps say, 'I was not bound to fence;' but then the plaintiff might reply, 'There was an opening through which you knew the pigs might get out of your field upon the line; you

¹ 5 Exch. 247.

² *Child v. Hearn*, L. R. 9 Exch. 176.

³ *Armstrong v. Lancashire etc. R. Co.*, L. R. 10 Exch. 47; s. c. 44 L. J. (Exch.) 89.

⁴ L. R. 9 Exch. 182.

Notes.

allowed them to be in the field, and I, using the road innocently, suffered injury through their escaping on to the line.' But however that might be, here the plaintiff was a servant of the owner of property which was unfenced through the owner's default. * * * The servant can be in no better position than the master, when he is using the master's property for the master's purposes. Therefore, without saying any thing as to the decision in *Thorogood v. Bryan*, it is sufficient to say that the defendant's pigs escaped through the negligence of the plaintiff's employer, and that, having met with the accident through his employer's negligence, the plaintiff can maintain no action against the defendant." POLLOCK, B., concurred in this reasoning; but PIGOTT, B., was of opinion that no negligence had been shown on the part of the defendant, and for this reason the plaintiff ought not to recover.

The foregoing remarks indicate that this case was decided upon a consideration both novel and arbitrary. Can it be said that the servant is identified with his master or fellow-servants for the purposes of a case of this kind? It would seem not. It is, indeed, a familiar legal fiction that the law implies a contract on the part of a servant, when he enters into service, that he will assume the ordinary risks which are incident to such employment, among which is the risk of suffering injury from the negligence of his fellow-servants or *collaborateurs*.¹ As a corporate body like a railroad corporation can act only through its agents or servants, the act of each servant, within the scope of his employment, may be said, with reference to his fellow-servants, to be, in contemplation of law, the act of such fellow-servants. To this extent the servants of a common employer may be said to be identified with each other. But this fiction of the law should be applied only to the exigencies which called it into existence. It is a rule of necessity and policy, adopted solely for the protection of the master from liability for injuries which flow from causes equally obvious to master and servant, and for which the master and the injured servant are equally blameless. Now, taking the case of an injury to a servant of a railway company, happening by reason of the concurrent negligence of such railway company, or its servants, and the tortious act or omission of a stranger, how can that stranger be heard to urge in his defence a rule of public policy which exists only for other and limited purposes? If it is by force of an implied contract that a servant is identified with his fellow-servants, persons not privy to such contract can claim no rights under it. Indeed, it would seem to be more consonant with justice to hold, that, because by a rule of public policy the servant is deprived of his action against his employer in such cases, there should remain to him his action against the concurrent wrong-doer.

§ 5. *American Authority upon this Subject.*—The deference which, in general, is justly paid to the adjudications of courts of England, has frequently resulted in the propagation, in this country, of the principles of some unfortunate decisions. *Thorogood v. Bryan* is an example of this. In Pennsylvania, the principle of this case seems to have been adopted in all its length and breadth.² The learned judge who delivered the opinion in the case, being satisfied that the passenger is to be regarded as identified with his carrier, but dissatisfied with the

¹ 2 Thomp. on Neg., p. 969.

² Lockhart v. Lichtenthaler, 46 Pa. St. 151.

American Authorities.

reasoning of the judges in that case, proceeded to say: "I would say the reason for it is, that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances, as an incentive to care and diligence. As the law fixes responsibility upon a different principle in the case of the carrier, as already noticed, from that of a party who does not stand in that relation to the party injured, the very philosophy of the requirement of greater care is that he shall be answerable for omitting any duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own. It would be altogether more just to hold liable him who has engaged to observe the highest degree of diligence and care, and has been compensated for so doing, rather than him upon whom no such obligation rests, and who, not being compensated for the observance of such a degree of care, acts only on the duty to observe ordinary care, and may not be aware even of the presence of a party who might be injured. This rule, it cannot be doubted, will be more likely to increase diligence than its opposite, which would enable a negligent and faithless party to escape the consequences of his want of care by swearing it on to another, which he would assuredly do if the temptation and opportunity offered. As this view accords best with the policy of the law, it is proof of the existence of the rule itself."¹

It is not perceived that the reasons for such a principle as established in *Thoroughgood v. Bryan* are less unsatisfactorily stated in the foregoing remarks than in the original case, because, — (1.) It may be positively denied that the adoption of the rule which we contend against is "an incentive to care and diligence." It is inconceivable that a railway company would lessen that high degree of care put upon it by the law, if, for example, in the case of a collision of trains at the intersection of tracks of different corporations, either company would be responsible to injured passengers by reason of the concurrent negligence of the trainmen of each company. The reasoning of the learned judge, therefore, seems to be purely speculative upon this point. (2.) There can be no hardship in holding all persons, under all circumstances, to the exercise of care with reference to others, according to such circumstances; nevertheless, the learned judge seems to intimate that, in the case of an accident which is the result of the concurrent negligence of two parties, — one acting with reference to the injured person according to the standard of ordinary care, and the other under an obligation to use the highest degree of diligence, — although each has failed to observe the degree of care required of him by law, the injured person is relegated for his remedy to one of them only.

It is gratifying to see the fallacy of the rule we are discussing, so ably exposed as in the opinion of BEASLEY, C. J., in *Bennett v. New Jersey Railroad and Transportation Company*:² "It is obvious, in a suit against the proprietor of the car in which he was a passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor; because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be

¹ Per Thompson, J., 46 Pa. St. 164.² *Ante*, p. 281.

Notes.

entirely arbitrary to say that he is not to be affected by it for other purposes."¹

The language of JOHNSON, J., of the Court of Appeals of New York, is equally explicit against this rule: "It is entirely plain that the plaintiff had no control, no management, even no advisory power, over the train on which he was riding. Even as to selection, he had only the choice of going by that railroad or none. To attribute to him, therefore, the negligence of the agents of the company, and thus bar him of a right of recovery, is not applying any existing exception to the general rule of law, but is framing a new exception which does not in fact rest upon the reason of the original exception, and is based on fiction, and inconsistent with justice."² Decisions have been subsequently rendered in this State in accordance with this exposition of the law.³

Such is the rule in Kentucky. A recovery of damages was allowed against a turnpike company for negligence in keeping their gate, resulting in an injury to a passenger on a stage-coach, although the driver of the coach was also negligent in not having his lamps lighted. STIRES, J., expressed the rule concisely: "Where an injury is occasioned by the negligence of two persons, the fault of one is no excuse for that of the other. Both, in that case, are liable to the party injured."⁴ This rule has been reaffirmed in a later case in the same court, where the injury resulted from a collision between a street car and a railroad train, caused by the reckless driving of the former and the negligent management of the latter, in consequence of which the plaintiff's intestate, a passenger upon the street car, met his death.⁵

§ 6. *Negligence of a Stranger concurring with Negligence of the Carrier, to Injury of Passenger.*—There can be no question as to the carrier's responsibility to a passenger for an accident which is the result of his negligence concurring with that of a stranger. To illustrate: A stage-coach, by the negligence of the driver, is precipitated into a dry canal; the lock-keeper thereafter negligently opens the gates of the canal, and drowns a passenger. Under Lord Campbell's Act,⁶ the Irish Court of Queen's Bench held that the death of a passenger under such circumstances, in the language of the act, was "caused" by the negligence of the carrier.⁷ In this case, O'BRIEN, J., said: "The precipitation of the omnibus into the lock was certainly one cause, and (as it may be

¹ 36 N. J. L. 227.

² *Chapman v. New Haven R. Co.*, 19 N. Y. 341, 344.

³ *Colegrove v. New York etc. R. Co.*, 20 N. Y. 492; *s. c.* 6 Duer, 382; *Webster v. Hudson etc. R. Co.*, 38 N. Y. 260. In the case of *Brown v. New York etc. R. Co.*, 32 N. Y. 597 (*s. c.* 31 Barb. 385), the question as to whether the passenger is to be regarded as identified with the carrier was somewhat discussed, but the language in that case must be regarded as entirely *obiter*, and was so regarded in a later case in this court. *Webster v. Hudson etc. R. Co.*, *supra*. It was a case of a collision at a highway-crossing, between a railroad train of the defend-

ants, and a stage-coach upon which the plaintiff was riding, whereby the plaintiff was injured. The justice at the circuit had charged that the plaintiff was responsible for the negligence of the driver of the stage in which she was riding, and the jury had found that there was no negligence on the part of the driver. The question of imputed negligence, therefore, was not before the court.

⁴ *Danville etc. Turnpike Co. v. Stewart*, 2 Metc. (Ky.) 119, 122.

⁵ *Louisville etc. R. Co. v. Case's Administrator*, 9 Bush, 728, 735. ⁶ 9 & 10 Vict., c. 93.

⁷ *Byrne v. Wilson*, 15 Irish C. L. (N. S.) 332, 342.

Concurring Negligence of Stranger — Children.

said) the primary cause, of her death, inasmuch as she would not have been drowned but for such precipitation. It is true that the subsequent letting of the water into the lock was the other and more proximate cause of her death, and that she would not have lost her life but for such subsequent act, which was not the *necessary* consequence of the previous precipitation by the negligence of defendant's servants. But, in my opinion, defendant is not relieved from liability for his primary neglect by showing that but for such subsequent act the death would not have ensued."

In another case, it appeared that the driver of a street car negligently permitted the plaintiff, a child five years old, and another child eleven years old, to ride upon the front platform of a street car, and that the elder child, who was not in charge of the plaintiff, but her companion merely, attempted to put her off while the car was in motion, and the plaintiff was injured. The court held that the negligence of the elder child was no defence to an action against the street-car company for the negligence of the driver in permitting the children to ride in such an exposed position.¹ In a New York case under the statute giving a right of action for injuries resulting in death, it appeared that the deceased, a boy nine years of age, was compelled by the conductor of a street car to stand upon a crowded platform. From this position he was thrown off the car by the hasty and careless departure of another passenger, and received injuries which caused his death. The court held that the servant of the defendants having put the deceased in a dangerous place, they were not relieved from the consequences of their default by the fact that the negligence of one of their passengers directly contributed to the injury.²

Another case presenting a combination of the negligence of several parties further illustrates the principle under discussion. The driver of a load of hay recklessly endeavored to drive it from the highway-crossing, upon and along the railway track, to certain private premises. This track was used by two other companies in the operation of their trains, besides the company owning it. During the progress of the wagon, the wheels became wedged in between the rails and the planking, and were held fast. The defendants' train, upon which the plaintiff was a passenger, having been detained by this circumstance, a flagman was sent up the track to stop other trains. There was evidence that this precaution was not adopted as soon as the situation of things became evident. The train of another company came rapidly around a curve at this point, and ran into the defendants' train, thereby causing the injury to the plaintiff. There was evidence also that the conductor and engineer of this colliding train were negligent in its operation. Under these circumstances, the defendants were held liable to the plaintiff for the injuries suffered, COLT, J., saying: "It is no answer to an action by a passenger against a carrier, that the negligence or trespass of a third party contributed to the injury."³

§ 7. Children and Persons of Unsound Mind as Passengers. — There would seem to be no doubt that when a child is so young that by reason of its imma-

¹ Pittsburgh etc. R. Co. v. Caldwell, 74 Pa. St. 421. See also East Saginaw City R. Co. v. Bohn, 27 Mich. 503.

² Sheridan v. Brooklyn etc. R.R., 36 N.Y. 39.

³ Eaton v. Boston etc. R. Co., 11 Allen, 500, 505. See also Spooner v. Brooklyn City R. Co., 54 N. Y. 230; Ryland v. Peters, 1 Phila. 264.

Notes.

turity and incapacity to guard itself against danger it is to be denominated *non sui juris*,¹ or even older than this,² if the parent or some duly authorized person has it in charge, the negligence of such custodian in caring for the child will be a complete defence to an action by the child for an injury which is the result of such negligence concurring with the negligence of the carrier.

The leading case upon this subject is that of *Waite v. North-Eastern Railroad Company*,³ the facts of which case were, that the plaintiff, a child five years old, was in charge of its grandmother, who procured tickets for both at the defendants' station with the intention of taking the train at that place. The pair, in crossing the track for the purpose of reaching a platform on the side of the station opposite the ticket-office, were run down by a train, under circumstances (as a jury found) of concurrent negligence on the part of the grandmother and the servants of the defendant. The grandmother was killed, and the plaintiff suffered personal injuries for which the suit was brought. In the Court of Queen's Bench, Lord CAMPBELL, C. J., held that the infant was so identified with the grandmother that the action could not be maintained. This view was sustained in the Court of Exchequer Chamber. CROWDER, J., there said:⁴ "The case is the same as if the child had been in the mother's arms. There is an identification, such that the negligence of the grandmother deprives the child of the right of action. Now, the finding of the jury would clearly have prevented the grandmother from recovering: it therefore has the same effect in respect of an action by the child. It would be monstrous and absurd if there could be a distinction." COCKBURN, C. J., said: "I put the case on this ground: that when a child of such tender and imbecile age is brought to a railway station, or to any conveyance, for the purpose of being conveyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge."

More favorable to the plaintiff is the rule laid down by the Supreme Court of Illinois in a case of this kind, viz.: The negligence of a parent or guardian having in charge a child of tender years will not excuse a carrier by rail from using all the means in its power to prevent injury to the child; yet, if the negligence of the former is the proximate cause of the injury to the child, by unnecessarily and imprudently exposing it to danger, the carrier cannot be held responsible, unless it is shown to have omitted duties the discharge of which would have averted the injury.⁵

The negligence of which a parent has been guilty in caring for his child under these circumstances, would seem to be properly imputable to such parent as personal representative of the child, in an action for a statutory penalty for its death, where such negligence concurring with the negligence of the carrier or his servants has produced this result. It was so adjudged in a recent case by the Supreme Court of Pennsylvania.⁶ In this case, the plaintiff's evidence developed the fact that her son, for whose death the action was brought, was

¹ As to when a child is *non sui juris*, see 2 Thomp. on Neg., p. 1180.

² *Holly v. Boston Gas Co.*, 8 Gray, 123; *Stillson v. Hannibal etc. R. Co.*, 67 Mo. 671; s. c. 7 Cent. L. J. 107.

³ El. Bl. & El. 719, 723.

⁴ El. Bl. & El. 735.

⁵ *Ohio etc. R. Co. v. Stratton*, 78 Ill. 83.

⁶ *Smith v. Hestonville etc. R. Co.*, 10 Cent. L. J. 272. (Decided February, 1880.)

Concurring Negligence of Stranger—Children.

less than seven years of age. He, with other boys, was in the habit of procuring water from a spring, and getting upon the platforms of street cars belonging to the defendants, and furnishing the drivers, conductors, and passengers with water. For this service he had been accustomed to receive various small gratuities. He had never been warned by the company's servants to keep off the cars. The plaintiff knew that her son was thus in the habit of going to the cars with water. The cup and pitcher used by him for this purpose were taken by him with her consent. On the fatal occasion, the deceased jumped upon the front platform of a car which was not provided with a fender, and gave a drink to the driver. No one saw the accident which ensued, or could explain the cause of it; but two or three minutes later, the car having continued moving in the meantime, the child was seen on the street, between the front and hind wheels, lying on his back, having been run over by the front wheel. The child survived his injuries less than two days. The conduct of the defendant's servants in thus permitting and encouraging the deceased to ride upon the cars was undoubtedly grossly negligent,¹ and a recovery must have been allowed had the child been maimed instead of killed, and he the plaintiff in the case instead of his parent.² In this case it will be seen that the personal representative of the deceased and the mother of the child, whose negligence concurred in causing its death, were one and the same person. The counsel for the plaintiff, however, ingeniously argued that they were to be regarded as separate and distinct persons; that the object of the act giving a right of action for death from a wrongful act was to *substitute* the personal representative of the deceased for him.³ The deceased was of an age too young to be denominated *sui juris*, and was therefore incapable of negligence;⁴ and it was argued that, as the only contributory negligence involved in the case was that of the deceased, a recovery ought to be allowed. The metaphysical distinction, however, thus sought to be drawn was not established to the satisfaction of the court. In the language of a note to this case, where the report is found,⁵ "it would seem that the court very properly refused to recognize any distinction between Elizabeth J. Smith, mother of the child killed, whose reckless disregard for its safety was instrumental in causing its death, and Elizabeth J. Smith, personal representative of the unfortunate lad, to whom the fruits of this action would have accrued in case a recovery of damages had been permitted."⁶ The same conclusion was reached in a similar case in New York, by a *nisi prius* court, but upon other grounds.⁷

In *Willett v. Buffalo, etc. Railroad Company*,⁸ which is a leading case upon this subject, a lunatic was travelling upon a railroad train, in company with his

¹ *Wilton v. Middlesex R. Co.*, 107 Mass. 108; *Pittsburgh etc. R. Co. v. Caldwell*, 74 Pa. St. 421; *Day v. Brooklyn R. Co.*, 12 Hun, 435.

² *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372; *Rauch v. Lloyd*, 31 Pa. St. 358; *Smith v. O'Connor*, 48 Pa. St. 218; *Glassey v. Hestonville etc. R. Co.*, 57 Pa. St. 172; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *Phila. etc. R. Co. v. Long*, 75 Pa. St. 257.

³ See 2 Bright. *Purd. Dig.* 1093.

⁴ 2 Thomp. on Neg., p. 1181.

⁵ 10 Cent. L. J. 274.

⁶ Citing *Bellefontaine etc. R. Co. v. Snyder*, 24 Ohio St. 670; *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; *s. c.* 37 Pa. St. 420; *Birmingham v. Dorer*, 3 Brewst. 69; *Isabel v. Hannibal etc. R. Co.*, 60 Mo. 475; *Walters v. Chicago etc. R. Co.*, 41 Iowa, 71; *O'Flaherty v. Union R. Co.*, 45 Mo. 70; *Koons v. St. Louis etc. R. Co.*, 65 Mo. 592; *Daley v. Norwich etc. R. Co.*, 26 Conn. 591, 598; *Baltimore etc. R. Co. v. The Statco*, 30 Md. 47.

⁷ *Fleming v. Brooklyn City R. Co.*, 1 Abb. N. C. 433.

⁸ 14 Barb. 585.

Notes.

father, who had paid the fare of both, through, and retained the tickets. The father got out at a stopping-place to procure refreshments, leaving his son in the cars without giving notice to any one of his condition; and while absent, the train started. On regaining the cars, the father did not find his son where he had left him, the latter having changed his seat. The conductor, during this absence, applied to the lunatic for his ticket, not knowing him to be insane or that his fare had been paid. The lunatic, being unable to deliver a ticket or make explanations, was ejected from the train. His conduct during this time, though strange, was not such as to inform the train-men of his mental condition. Subsequently, while wandering along the track in the night-time, he was run over and killed by another train, under circumstances which showed no negligence on the part of the managers of this train. In an action under the New York statute¹ authorizing an action to recover damages by the personal representative for the death of a person by the wrongful act, neglect, or default of another, it was held that the negligence of the parent must be attributed to the deceased; that this negligence was such that the deceased could not have maintained an action if he had been injured instead of killed; therefore no action could be maintained by his personal representative.

§ 8. **Other Cases illustrative of the Rule.**—A class of cases is brought together under this head, not because they belong within the scope of this book, for they do not arise out of any contract of carriage, express or implied, but because they illustrate the rule under discussion in other relations. Friends are riding together in a private conveyance, or *paterfamilias* is taking his family out for a drive: in case of an injury resulting from the concurrent negligence of the driver of the vehicle, and others outside of the vehicle, what shall be the rule as to its occupants? Are they to be regarded as “identified” with the driver of their conveyance? In such cases there would seem to be a proper reason for saying that the passenger, having trusted the parties owning or driving the vehicle, by choosing that particular conveyance, has so far identified himself with such persons that if any injury results from their negligence he must be considered a party to it. “One enters a public conveyance, in some sort, of moral necessity. One generally enters a private conveyance of free choice, voluntarily trusting to its sufficiency and safety.”² Authority, however, is not uniform upon this point. The language of one of the judges of the Court of Exchequer Chamber would seem to indicate that it is proper to hold that there is an identification of the driver with the person carried under such circumstances,³ and, in view of the rule declared in *Thorogood v. Bryan*, an English court would probably so decide such a case. In several of the States this point has been thus adjudicated.⁴ The contrary, however, is held by the Court of Appeals of New York.⁵

¹ Laws N. Y. 1847, p. 575.

² Per Ryan, C. J., in *Prideaux v. Mineral Point*, 43 Wis. 513, 528; s. c. 6 Cent. L. J. 430.

³ Williams, J., in *Waite v. North-Eastern R. Co.*, El. Bl. & El. 734.

⁴ *Houfe v. Fulton*, 29 Wis. 296; *Prideaux v. Mineral Point*, *supra*; *Payne v. Chicago etc. R. Co.*, 39 Iowa, 523; *Lake Shore etc. R. Co. v. Miller*, 25 Mich. 274.

⁵ *Robinson v. New York etc. R. Co.*, 66 N. Y. 11; *Metcalf v. Baker*, 2 Jones & Sp. 10; s. c. 11 Abb. Pr. (N. S.) 431; 52 N. Y. 649; *Knapp v. Dagg*, 18 How. Pr. 165. *Contra*, *Beck v. East River Ferry Co.*, 6 Robt. 87, per Robertson, C. J., on the authority of *Brown v. New York etc. R. Co.*, 32 N. Y. 601, a case which has since been overruled by the Court of Appeals upon this point. See *Webster v. Hudson etc. R. Co.*, 38 N. Y. 260; *ante*, § 5.

CHAPTER VIII.

POLICE DUTIES OF THE CARRIER.

LEADING CASE: 1. *Pittsburgh, Fort Wayne, and Chicago Railway Company v. Hinds*.—Duty of the conductor of a railway train to protect passengers from the assaults of fellow-passengers.

NOTES: § 1. Carrier's authority and duty in this particular.
2. Intoxicated, disorderly, and dangerous passengers.
3. Use of profane language, and other improprieties.
4. Failure to execute proper police regulations—Consequential injury to passenger.

DUTY OF THE CONDUCTOR OF A RAILWAY TRAIN TO PROTECT PASSENGERS FROM THE ASSAULTS OF FELLOW-PASSENGERS.

PITTSBURGH, FORT WAYNE, AND CHICAGO RAILWAY COMPANY v. HINDS.*

Supreme Court of Pennsylvania, 1866.

HON. GEORGE W. WOODWARD, *Chief Justice*.

" JAMES THOMPSON,	} <i>Judges.</i>
" WILLIAM STRONG,	
" JOHN M. READ,	
" DANIEL AGNEW,	

1. **Reciprocal Duties of Carrier and Passenger.**—The carrier is under an obligation to protect the passenger by the enforcement of proper police regulations. The passenger is under a reciprocal obligation to subordinate himself to such regulations.
2. **Not bound to provide against Injury at all Events.**—Railroad companies are, however, under no obligation to furnish their trains with a standing police-force sufficient for the emergencies of occasions of extraordinary danger to passengers, which could not have been foreseen.
3. **Powers and Duties of Conductor of Railroad Train on Occasions of Danger.**—It is the duty, however, of the conductor upon such an occasion to exhaust every means in his power to further the safety of passengers: to stop the train, call together all the servants of the company, and such passengers as are willing to lend a helping hand, and make a determined effort to quell a disturbance which threatens the safety of passengers in general.

* Reported, 53 Pa. St. 512.

Pittsburgh, Fort Wayne, and Chicago Railway Company v. Hinds.

ERROR to the Court of Common Pleas of Allegheny County.

This action was brought December 5, 1865, by Parker Hinds and Martha Jane, his wife, against the Pittsburgh, Fort Wayne, and Chicago Railway Company, for injury to her whilst riding on the defendants' train.

The declaration contained two counts, both averring, in forms slightly variant, negligence on the part of the defendants and their officers in charge of the train, resulting in the dislocation of the plaintiff's arm; but not setting out the manner in which it was done.

The injury occurred under the following circumstances: An agricultural fair was in progress near the town of Beaver, about the middle of October, 1865. On one of the days of the fair, Mrs. Hinds was a passenger on the defendants' train, in the ladies' car, which was the hindmost in the train. As the train approached the Beaver station, a large crowd of boisterous, drunken men and women were seen approaching the station, and as soon as the train stopped, noisy and disorderly drunken men forced themselves into the ladies' car. The evidence made it pretty clear that it was impracticable for the conductor to keep them off the train. One of the intruders, who was amongst the most boisterous, and was uttering loud threats against some one, jumped on the rear platform as the car started. Soon after the car moved off, a fight was commenced in this car by the last intruder. In the course of the fight, some one was thrown upon Mrs. Hinds with such violence that her arm was greatly injured and she laid by from her ordinary duties. The evidence was conflicting as to the efforts made by the conductor to quell the fight,—some of the witnesses testifying that he could have got amongst the combatants; others, that the crowd was so dense that he could not enter the car at all, and could do no more than stand at the door and call out for peace, and tell the passengers to throw the rioters from the car. The car was stopped two or three times between Beaver and the next station; but at each time went on after two or three minutes or less, without any thing special being done to stop the fight or eject the rioters. All, or most of them, got out at the next station.

On the trial, the plaintiff offered evidence to show "when, where, and how the plaintiff was injured." The defendant objected "to evidence being received under the pleadings, except such as tends to establish an injury to the plaintiff resulting from some accident to the train."

The objection was overruled, and an exception taken. There were also points submitted by the plaintiff which the opinion of the Supreme Court makes it unnecessary to specify.

Supreme Court of Pennsylvania.

The court (STOWE, A. J.) said to the jury that the plaintiff claimed to recover, —

“1. Because the evidence shows that the conductor did not do his duty at Beaver Station, by allowing improper persons to get upon the cars.

“2. Because he allowed more persons than was proper under the circumstances to get on the train and to remain upon it.

“3. That he did not do what he could and ought to have done to put a stop to the fighting upon the train, which resulted in the plaintiff's injury.”

After discussing the law as to the first two propositions, and submitting them as questions of fact, he said as to the third: —

“The evidence shows that there was a fight going on in the cars; that the conductor was notified, and that he did not interfere to prevent it. We instruct you, as a principle of law, that the conductor of a train is bound to attempt to put a stop to a fight in the cars, if he can do so without apparently involving great personal danger to himself; and if no attempt is made, and no sufficient excuse be shown for not making an effort to do so, and, in the *mêlée*, passengers not participating, but quietly occupying their seats, are injured, the railway company employing such conductor is liable in damages.

“In such case, the law casts the burden of proof upon the defendant to prove that an effort commensurate with the contingency was made, or to show such facts as will induce a jury to believe that it would have been fruitless, or accompanied with actual or apparent great personal danger.

“Has, then, the conductor shown you such facts as in your opinion excuse him from entering the car and using his authority to stop the fight, under the circumstances as established by the testimony?

“If he could not get into the car by reason of the crowd, *he has*. If the facts satisfy you that he could have got in by any reasonable possibility, it was his duty to go, and to use every proper means to stop the affray; and to say that he might have failed to stop it, will not do in such cases, because he was bound to make the attempt. The law does not hold him to perform impossibilities, but it does hold him to a strict performance of his duty, or to show a reasonable excuse for its non-performance.

“If all is done that reasonable men would say was proper and right under the circumstances, that is all that is required, but less will not suffice.”

There was a verdict for the plaintiff for \$2,250.

Pittsburgh, Fort Wayne, and Chicago Railway Company *v.* Hinds.

The errors assigned were, the admission of the evidence, and the charge of the court in submitting the case to the jury, as stated in the three propositions.

J. H. Hampton, for plaintiff in error; *T. M. Marshall*, for defendant in error.

The opinion of the court was delivered by —

WOODWARD, C. J. — The action is for an injury sustained by the plaintiff's wife whilst she was a passenger in the cars of the defendants; and what is peculiar in the case is the fact that the injury was not occasioned by defective machinery or cars or road, or by any thing that pertained properly to their business as transporters, but was caused by the fighting of passengers among themselves. Drunken and quarrelsome men intruded into the ladies' car in great numbers whilst the train stopped at Beaver Station, and in the disgraceful fight which ensued among them the plaintiff's arm was broken, and for this the railroad company is sued. Had the suit been against the riotous men who did the mischief, the right of recovery would have been undoubted; for it is not more the duty of railroad companies to transport their passengers safely than it is the duty of passengers to behave in a quiet and orderly manner. This is a duty which passengers owe both to the company and to fellow-passengers, and when one is injured by neglect of this duty, the wrong-doer should respond in damages. But in such a case is the company liable?

There is no such privity between the company and the disorderly passenger as to make them liable on the principle of *respondeat superior*. The only ground on which they can be charged is a violation of the contract they made with the injured party. They undertook to carry the plaintiff safely, and so negligently performed this contract that she was injured. This is the ground of her action; it can rest upon no other. The negligence of the company, or of their officers in charge of the train, is the gist of the action, and so it is laid in the declaration. And this question of negligence was submitted to the jury in a manner of which the company have no reason to complain. The only question for us as a court of error, therefore, is whether the case was, upon the whole, one that ought to have been submitted. The *manner* of the submission having been unexceptionable, was there error in the fact of submission?

The learned judge reduced the case to three propositions. He said the plaintiff claims to recover, —

“1. Because the evidence shows that the conductor did not do his duty at Beaver Station, by allowing improper persons to get on the cars.

Supreme Court of Pennsylvania.

"2. Because he allowed more persons than was proper, under the circumstances, to get on the train and to remain upon it.

"3. That he did not do what he could and ought to have done to put a stop to the fighting upon the train, which resulted in the plaintiff's injury."

As to the first of the above propositions the judge referred the evidence to the jury, especially with a view to the question whether the disorderly character of the men at Beaver Station had fallen under the conductor's observation so as to induce a reasonable man to apprehend danger to the safety of the passengers.

The evidence on this point was conflicting, but it must be assumed that the verdict has established the conclusion that the conductor knew that drunken men were getting into the cars. Let it be granted also, as a conclusion of law, that a conductor is culpably negligent who admits drunken and quarrelsome men into a passenger-car. What then?

The case shows that an agricultural fair was in progress in the vicinity of Beaver Station; that an excited crowd assembled at the station, rushed upon the cars in such numbers as to defy the resisting power at the disposal of the conductor, and that the man who commenced the fight sprang upon the platform of the hindmost car after they were in motion.

Of what consequence, then, was the fact that the conductor knew these were improper passengers? It is not the case of a voluntary reception of such passengers. If it were, there would be great force in the point; for more improper conduct could scarcely be imagined in the conductor of a train than voluntarily to receive and introduce among quiet passengers, and particularly ladies, a mob of drunken rowdies. But the case is that of a mob rushing with such violence and in such numbers upon the cars as to overwhelm the conductor as well as the passengers.

It is not the duty of railroad companies to furnish their trains with a police force adequate to such emergencies. They are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration.

When passengers purchase their tickets and take their seats, they know that the train is furnished with the proper hands for the conduct of the train, but not with a police force sufficient to quell mobs by the wayside. No such element enters into the implied contract. It is one of the incidental risks which all who travel must take upon themselves,

Pittsburgh, Fort Wayne, and Chicago Railway Company *v.* Hinds.

and it is not reasonable that a passenger should throw it upon the transporter.

These observations are equally applicable to the second proposition. The conductor did not "allow" improper numbers, no more than improper characters, to get upon the cars. He says he took no fare from them, and in no manner recognized them as passengers. To allow undue numbers to enter a car is a great wrong, almost as great as knowingly to introduce persons of improper character, and in a suitable case we would not hesitate to chastise the practice severely. But this is not a case in which the conductor had any volition whatever in respect either of numbers or characters. He was simply overmastered, and the only ground upon which the plaintiff could charge negligence upon the company would be in not furnishing the conductor with a counter-force sufficient to repel the intruders. This was not the ground assumed by the plaintiff, and it would scarcely have been maintainable had it been assumed.

Taking the case as it is presented in the evidence, we think it was error for the court to submit the cause to the jury on these two grounds. But upon the third ground we think the cause was properly submitted.

If the conductor did not do all he could to stop the fighting, there was negligence. Whilst a conductor is not provided with a force sufficient to resist such a raid as was made upon the train in this instance, he has, nevertheless, large powers at his disposal, and, if properly used, they are generally sufficient to preserve order within the cars and to expel disturbers of the peace. His official character and position are a power. Then, he may stop the train and call to his assistance the engineer, the fireman, all the brakemen, and such passengers as are willing to lend a helping hand; and it must be a very formidable mob indeed, more formidable than we have reason to believe had obtruded into these cars, that can resist such a force. Until at least he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict. To keep his train in motion, and busy himself with collecting fares in forward cars whilst a general fight was raging in the rearmost car, where the lady passengers had been placed, was to fall far short of his duty. Nor did his exhortation to the passengers to throw the fighters out, come up to the demands of the hour. He should have led the way, and no doubt passengers and hands would have followed his lead. He should have stopped the train and hewed a passage through the intrusive mass, until he had expelled the rioters, or have demonstrated by an earnest experiment that the undertaking was impossible.

Notes.

Such are the impressions which this novel case has made upon our minds. We think there was error in submitting the case upon the first two propositions, but none in submitting it on the third, and if the record showed that the jury decided it upon this latter ground, the judgment could be affirmed. But, inasmuch as the error we find upon the record may have infected the verdict, the judgment must be reversed, and a

Venire facias de novo awarded.

NOTES.

§ 1. **Carrier's Authority and Duty in this Particular.**—For the reason that the carrier owes to the passenger the exercise of the utmost diligence for his comfort and safety while the relation of carrier and passenger subsists, the former has the authority to institute and execute proper police regulations for the protection of the latter. The subordination of the passenger to reasonable regulations of this character is a reciprocal duty. The violation of such regulations by a passenger justifies his summary expulsion from the carrier's vehicle or premises,¹ or forcible separation from the other passengers.² The authority of the carrier in this respect is correlative with his duty. In a case before the Supreme Court of Mississippi,³ this matter is well considered by CHALMERS, J., who concludes as follows: "Powers and duties are usually reciprocal, and may be said to be uniformly so when the power is of a public, official character, conferred for the benefit of others. The failure or refusal of the official to exercise such a power in a proper case, when called upon by those for whose protection he has been invested with it, amounts to negligence, or to wilful misconduct, as the circumstances of the case may indicate. * * * A failure to discharge this duty stands, to some extent, upon the same footing as the omission to perform any other official duty, and, upon the maxim *respondeat superior*, renders the corporation liable."

Of course, a considerable degree of caution is necessary in the execution of this power. The carrier will be responsible for the act of his servant in expelling a passenger from his vehicle under a mistake of fact or of judgment as to the misconduct of the latter.⁴ Upon familiar principles, no more force can be used than is adequate for the purpose of expulsion.⁵ Thus, in *Seymour v. Green-*

¹ *Vinton v. Middlesex R. Co.*, *ante*, p. 6; *Chicago etc. R. Co. v. Griffin*, 68 Ill. 499; *Pittsburgh etc. R. Co. v. Van Houten*, 48 Ind. 90; *Pittsburgh etc. R. Co. v. Valleley*; 32 Ohio St., 345; *s. c.* 7 Reporter, 406; 6 Cent. L. J. 277.

² *Marquette v. Chicago etc. R. Co.*, 33

Iowa, 562; *Chicago etc. R. Co. v. Williams*, 55 Ill. 185, 188.

³ *New Orleans etc. R. Co. v. Burke*, 53 Miss. 200; *s. c.* 4 Cent. L. J. 539.

⁴ *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23.

⁵ *The State v. Ross*, 26 N. J. L. 224; *Murphy v. Union R. Co.*, 118 Mass. 223.

Notes.

wood,¹ the Court of Exchequer Chamber held that the carrier was responsible for an injury caused by the needlessly violent expulsion from an omnibus of a person who was drunk, had refused to pay his fare, and had assaulted the guard. The time, place, and circumstances, also the condition of the passenger, will be elements for the jury in deciding whether the expulsion was effected in a reasonable manner, so as not to inflict wanton or unnecessary injury upon the offending passenger, nor needlessly to place him in circumstances of peril at the time of and after his expulsion.²

§ 2. **Intoxicated, disorderly, and dangerous Passengers.** — If the conduct of the passenger is such as to excite reasonable apprehensions that his presence will result in injury or annoyance to other passengers, it is the right and duty of the conductor to expel him, without waiting for any overt act of violence.³ Gamblers and monte-men, whose purpose in travelling upon a train is to ply their vocations, may be excluded therefrom. But if a ticket has been sold to such a person, and the company desires to rescind the contract for transportation, and prevents him from getting on board, it should at the same time tender the return of the money paid for the ticket.⁴

In the case just noticed, the plaintiff was prevented from entering the train. Said DUNDY, J.: "Necessary force may be used to prevent gamblers from entering trains, and if found on them *engaged* in gambling, and refusing to desist, they may be forcibly expelled." It is not perceived why, according to the principle of *Vinton v. Middlesex Railroad Company*,⁵ gamblers, pickpockets, sneak-thieves, and persons whose notoriously vicious character renders it extremely probable that their presence will result in the robbery or swindling of other passengers, may not be excluded even after they have taken passage upon the train, and before they have begun to ply their vocation. The circumstance that large numbers of the travelling public are defenceless persons, and that their property, while on the journey, is quite insecure, would seem to be a sufficient reason for vesting the carrier's servants with the power and duty of summarily expelling such notorious law-breakers at any time from a railroad train, steamboat, street car, or other public conveyance. "The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers if he was admitted into a public vehicle, or allowed longer to remain within it."⁶ If the probability of mere discomfort or annoyance is a sufficient reason for the expulsion of an obnoxious passenger, *à fortiori* that of robbery ought to be.

The foregoing observations are prompted by the circumstance that sufficient consideration does not seem to have been bestowed by ROLFE, B., upon the

¹ 7 Hurl. & N. 355 (affirming s. c. 6 Hurl. & N. 359).

² *Pittsburgh etc. R. Co. v. Valleley*, 32 Ohio St. 345; s. c. 7 Reporter, 406; *Murphy v. Union R. Co.*, 118 Mass. 228; *Marquette v. Chicago etc. R. Co.*, 33 Iowa, 562; *Haley v. Chicago etc., R. Co.*, 21 Iowa, 15.

³ *Vinton v. Middlesex R. Co.*, 11 Allen, 304, *ante*, p. 6.

⁴ *Thurston v. Union Pacific R. Co.*, 4 Dill. 321, *ante*, p. 10.

⁵ *Ante*, p. 6.

⁶ Bigelow, C. J., in *Vinton v. Middlesex R. Co.*, *ante*, p. 9.

Failure to execute Regulations.

security of passengers, in a *nisi prius* case, where he ruled that though certain passengers were known to be pickpockets, that might be a reason for watching them, but *per se* did not justify putting them off.¹ It cannot be seriously contended, for example, that it is the duty of the conductor of a railroad train to detail a squad of brakemen from the control of the train to watch a gang of known pickpockets, or of the railroad company to supply every train with a private police force for this purpose.² Such is not the duty of carriers or their agents. Therefore, if the language of *ROLFE, B.*, is the law, passengers are without adequate protection against persons known to be dangerous, who have boarded a public conveyance for the express purpose of robbery or swindling.³

The master of a ship has been held responsible for losses incurred by a passenger at the hands of a pair of gamblers and tricksters, which it was in his power to have prevented, because he was aware of the character of one of the swindlers. The cheating was done in the presence of the clerk of the boat, and the master was informed of the circumstance in season to have compelled the pair to disgorge.⁴

§ 3. *Use of Profane Language, and other Improprieties.*—The use of profane and indecent language in the presence of ladies is such a breach of decorum as will afford just cause for the removal of the passenger from the carrier's conveyance, although he was provoked to such expressions by the demand of the conductor for fare which had already been paid.⁵ If a person, having purchased a ticket, attempts to get aboard a car when disgustingly drunk, or so drunk as to be likely to violate the common proprieties and decencies of life, he has no right to passage while in that condition;⁶ but slight intoxication, such as would not be likely to seriously affect the conduct of the person intoxicated, would not be sufficient ground to refuse him passage, although his behavior might not be in all respects strictly becoming.⁷

§ 4. *Failure to execute proper Police Regulations—Consequential Injury to Passenger.*—As before stated, the duty of protection which the carrier owes to the passenger includes a responsibility for the unlawful acts of fellow-passengers, when by the exercise of the highest degree of care those acts might have been foreseen and prevented.⁸ As stated by *SHIPMAN, J.*, in *Flint v. Norwich*,

¹ *Coppin v. Braithwaite*, 8 Jur. 875. This case was cited by *Davis, J.*, in the opinion of the court in *Pearson v. Duane*, 4 Wall. 605, 615, *ante*, p. 20; but the facts of that case in no respect resemble those under discussion, as the passenger was not a dangerous person.

² *Pittsburgh etc. R. Co. v. Hinds*, 53 Pa. St. 512, 516, *s. c. ante*, p. 295, per *Woodward, C. J.*

³ *Weeks v. New York etc. R. Co.*, 72 N. Y. 56; *s. c.* 17 Am. L. Reg. (N. S.) 506; 6 Reporter, 54.

⁴ *Smith v. Wilson* (U. S. Dist. Ct. South. Dist. Ala., *Busteed, J.*), 31 How. Pr. 272.

⁵ *Chicago etc. R. Co. v. Griffin*, 68 Ill. 499.

See also *The People v. Caryl*, 3 Park. Cr. Cas. 326.

⁶ *Murphy v. Union R. Co.*, 118 Mass. 228; *Vinton v. Middlesex R. Co.*, *ante*, p. 6. *The State v. Ross*, 26 N. J. L. 224; *Pittsburgh etc. R. Co. v. Vandyne*, 57 Ind. 576; *Hendricks v. Sixth Avenue R. Co.*, 12 Jones & Sp. 8.

⁷ *Putnam v. Broadway etc. R. Co.*, 55 N. Y. 108, 114; *Pittsburgh etc. R. Co. v. Vandyne*, *supra*.

⁸ *Pittsburgh etc. R. Co. v. Hinds*, *ante*, p. 295; *Putnam v. Broadway etc. R. Co.*, 55 N. Y. 108; *Flint v. Norwich etc. Transp. Co.*, 34 Conn. 554; *s. c.* 6 Blatchf. 158; *Pittsburgh etc. R. Co. v. Pillow*, 76 Pa. St. 510; *New Orleans etc. R. Co. v. Burke*, 53 Miss. 200; *s. c.*

Notes.

etc. Transportation Company,¹ carriers are "bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence, from whatsoever source arising, which might reasonably be anticipated or naturally be expected to occur, in view of all the circumstances, and of the number and character of the persons on board." Therefore, in a case in which the plaintiff was injured by the accidental discharge of a gun which fell from the hands of a soldier, engaged in a scuffle, who was one of a large body of soldiers who had embarked upon the defendant's boat, — many of them drunk and disorderly, though in charge of their officers and a guard, — he left it to the jury to say whether the officers of the boat were properly vigilant in attempting to quell the disorder, or in informing the passengers of the character of the men and the danger of coming in contact with them.² Although it is not the duty of a railroad company to furnish a standing police force adequate to the resistance of mobs of disorderly persons who may board its trains, yet it is the duty of the conductor of the train to make all possible resistance against such disorderly persons, by calling together for this purpose all the train-men and passengers willing to lend a helping hand to this end.³ Whether the carrier has provided a sufficient number of officers for the protection of its passengers, is a question for the jury.⁴ The conductor of a railroad train does not perform his duty on the occasion of a violent disturbance among a large body of drunken passengers by coming to the car door and counselling the sober passengers to throw the rioters from the car,⁵ nor by simply hurrying an assaulted passenger from one car into another, making no effort to remove from the train the persons guilty of the assault, or prevent their further violence.⁶

If the assault upon the passenger is so sudden that it cannot be prevented, and the conduct of the person making the assault has previously not been such that his action might reasonably have been anticipated, the carrier will not be responsible for the consequences.⁷ Thus, an intoxicated passenger, having insulted two women who were in the company of the plaintiff's intestate, was ordered by the conductor of the street car in which they were riding to take a seat and be quiet, which he did. After the conductor returned to the rear platform of the car, the passenger resumed his abuse, and threatened the plaintiff's intestate with violence. None of this last conversation was in a tone sufficiently loud for the conductor to hear, nor was there any evidence that it came to his knowledge. The passenger then went upon the front platform, and remained there quietly until the plaintiff's intestate left the car and was assisting his companions to alight, when the passenger in question came around from the front platform and assaulted him with a car-hook, inflicting blows upon his head from the effects of which he died. The Court of Appeals held that in this case a motion for a nonsuit should have been granted. Said ALLEN, J., deliver-

4 Cent. L. J. 539; *Holly v. Atlanta Street R. Co.* (Sup. Ct. Ga.), 7 Reporter, 460; *Sherley v. Billings*, 8 Bush, 147; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 213, per Walton, J.; *Hendricks v. Sixth Avenue R. Co.*, 12 Jones & Sp. 8.

¹ *Supra*.

² *Flint v. Norwich etc. Transp. Co.*, 34 Conn. 554.

³ *Pittsburgh etc. R. Co. v. Hinds*, *ante*, p. 295.

⁴ *Holly v. Atlanta Street R. Co.* (Sup. Ct. Ga.), 7 Reporter, 460.

⁵ *Pittsburgh etc. R. Co. v. Hinds*, *supra*.

⁶ *New Orleans etc. R. Co. v. Burke*, 53 Miss. 200; s. c. 4 Cent. L. J. 539.

⁷ *Putnam v. Broadway etc. R. Co.*, 55 N. Y. 103.

Failure to execute Regulations.

ing the opinion of the court: "The fact that an individual may have drank to excess will not, in every case, justify his expulsion from a public conveyance. It is rather the degree of intoxication, and its effect upon the individual, and the fact that by reason of the intoxication he is dangerous or annoying to the other passengers, that gives the right and imposes the duty of expulsion.¹ * * * If there was any thing in the condition, conduct, appearance, or manner of Foster [the assailant] from which the jury could reasonably infer that there was reason to expect or anticipate an attack upon the deceased, or any other passenger, either while upon the car or in the act of leaving, the facts authorizing such inference should have been proved, and the knowledge of them brought home to the conductor."²

Although the circumstances of an assault upon a passenger may be such that the company will be liable for injuries sustained by the passenger, yet this liability does not cover every species of damage. Thus, the car in which the plaintiff was a passenger was left standing alone, in the city of New York, without any of the company's servants upon it. The plaintiff, while leaving the car, was violently assaulted and robbed of a large quantity of bonds, by three persons, whose presence upon the car was unknown to the defendant's servants, though it might have been known but for their negligence. In an action for the value of the securities thus taken from the passenger, the court held that the defendant owed no such duty to the plaintiff as that of an insurer of the safe carriage of his securities in the mode of carriage adopted by him.³ But where the police regulations of a steamboat are so lax that time and opportunity is given a thief, without detection to enter a state-room of the ladies' cabin, which was properly fastened, and steal therefrom a portion of the plaintiff's baggage, the proprietors of the boat were held responsible for the loss.⁴

¹ *Id.* 114.

² *Id.* 118. See also *New Orleans etc. R. Co. v. Burke*, 53 Miss. 200, 225.

³ *Weeks v. New York etc. R. Co.*, 72 N. Y.

56; *s. c.* 17 Am. L. Reg. (N. S.) 506; 6 Reporter, 54.

⁴ *Walsh v. The H. M. Wright*, Newb. Adm. 494. But see *Abbott v. Bradstreet*, 55 Me. 530.

CHAPTER IX.

REGULATIONS OF THE CARRIER.

- LEADING CASES: 1. *Day v. Owen*.—Regulations must be reasonable: whether so, a mixed question of law and fact—Exclusion of colored passenger from cabin of steamboat.
2. *Bass v. Chicago and North-Western Railway Company*.—The same subject—Exclusion of male passenger from ladies' car.
3. *Chicago, Burlington, and Quincy Railroad Company v. Parks*.—Discrimination between price of ticket and fares paid on the train.
4. *Dunn v. Grand Trunk Railway*.—Passengers upon freight-trains are not presumed to have knowledge of a regulation of the company forbidding the reception of passengers upon such trains.

- NOTES: § 1. Power of carriers to establish regulations.
2. Regulations as to exhibition and delivery of tickets.
3. Passengers riding without ticket, or without a proper ticket.
4. Refusal to pay fare.
5. Discrimination in price of tickets purchased at the company's office and fare paid on the train.
6. Transportation of passengers upon freight-trains.
- (1.) In general.
- (2.) Who are to be regarded as passengers.
7. Classification of passengers.
- (1.) According to sex.
- (2.) According to color.
8. Exclusion of "runners" from carrier's vehicles and premises.

1. REGULATIONS MUST BE REASONABLE—EXCLUSION OF COLORED PASSENGER FROM CABIN OF STEAMBOAT.

DAY *v.* OWEN.*

Supreme Court of Michigan, 1858.

Hon. GEORGE MARTIN, *Chief Justice.*

" RANDOLPH MANNING,	} <i>Judges.</i>
" ISAAC P. CHRISTIANCY,	
" JAMES V. CAMPBELL,†	

1. **Carrier may make reasonable Regulations.**—The right *to be carried* by a common carrier of passengers is a right superior to the rules and regulations of the conveyance.

 Supreme Court of Michigan.

and cannot be affected by them; but the *accommodation of passengers* while being transported is subject to such rules and regulations as the carrier may think proper to make, provided they be reasonable. Such rules and regulations must have for their object the accommodation of passengers generally, and they must be of a permanent nature, and not made for a particular occasion or emergency.

2. **Pleading such Regulations.**—It is sufficient, in pleading, to state the rule or regulation; that the plaintiff comes within it; and to aver its reasonableness. The facts upon which the party relies to establish its reasonableness need not be spread upon the record.
3. **Reasonableness of Regulations a Mixed Question of Law and Fact—Case in Judgment—Exclusion of Colored Passenger from Cabin of Steamboat.**—In an action against a common carrier of passengers for refusing the plaintiff (a colored person) cabin passage, the defence was, that, by the regulations and established course of business of the boat, persons of the plaintiff's race were not allowed the use of the cabin as passengers, which regulation and course of business were averred to be reasonable; to which the plaintiff demurred. Such demurrer was not well taken, the reasonableness of the regulation in question being a mixed question of law and fact, to be found by the jury on the trial, under the instructions of the court, and not to be determined on demurrer.

ERROR to Wayne Circuit.

The action was case against the defendant as a common carrier.

The first count in the declaration alleged that the defendant was the owner of the steamer Arrow, plying between Detroit and Toledo, and that the plaintiff applied on board of said steamboat for a cabin passage from Detroit to Toledo, and offered to pay for the same, which was averred to be a usual mode of conveyance of passengers upon said boat; that, although there was room, the defendant refused to give the plaintiff a cabin passage, whereby the plaintiff was put to great expense, trouble, and delay, and obliged to travel in the night a hundred miles out of his way to reach Toledo. A second count alleges that the defendant was a common carrier, by water, of passengers in and by the cabin and deck of said steamboat, for the conveyance of travellers in and by said cabin, or in and upon said deck, according as such travellers may require, for reasonable hire and reward, which was greater in case conveyance was required in the cabin than in case it was required upon the deck, and was the proprietor of said cabin, or covered room, and of said open deck, as well as of all parts of said vessel; that the plaintiff went on board of said boat and demanded to be carried in said covered room to Toledo; but, although the plaintiff tendered the greater hire and reward, and although the vessel was ready to start, and said covered room was not full of passengers, and there was no ground for refusal, yet the defendant refused to carry plaintiff in said cabin, etc., causing plaintiff great expense, loss, and mortification. A third count alleged a refusal to carry generally, stating that the defendant set up no ground of refusal except that the plaintiff was a colored man.

Day v. Owen.

This count contained no averment that plaintiff offered, or was ready and willing to pay the fare.

The defendant pleaded the general issue, and appended thereto three notices of special matter to be shown at the trial: —

“1. That the plaintiff was a colored man, and not a white man; and that by the custom of navigation, and the usage prevailing among steamboats employed in carrying passengers on Detroit River and Lake Erie, colored persons were not allowed the privileges of cabin passengers.

“2. That by the regulation and established course of business of the said boat, colored persons were not received as cabin passengers, and were not allowed to use the cabin as such passengers; and said regulation and course of business were averred to be reasonable.

“3. That the plaintiff, by his color and his race, was excluded from ordinary social and familiar intercourse with white persons by the custom of the country, and that his admission into the cabin of said steamboat would have been offensive to the other cabin passengers.”

General demurrer by the plaintiff, which was overruled, and judgment for defendant for costs rendered; and thereupon the plaintiff brought error.

Holding said notices a sufficient defence is assigned as error.

Walkers & Russell, for plaintiff in error; *S. T. Douglass*, for defendant in error.

MANNING, J. — The declaration contains three counts. The first and second for refusing to carry the plaintiff in the cabin, the third for refusing to carry him generally.

This last count is bad, as it contains no averment that plaintiff offered, or was ready and willing, to pay the fare.

The notice accompanying the general issue sets up three several grounds of defence to the declaration, and may therefore be considered as three separate notices. The demurrer is to the whole notice; and if any one of these defences is good to the other counts in the declaration, the demurrer was properly overruled, and the judgment of the court below must be affirmed.

The second ground of defence stated in the notice is, that by the regulations and established course of business of the steamer, colored persons were not received as cabin passengers, and were not allowed to use the cabin as such passengers; and avers such regulations and course of business to be reasonable.

The second count of the declaration states two modes of carrying passengers, — one on deck, and the other in the cabin. It then alleges that passengers were carried either way, as they might require, on paying

Supreme Court of Michigan.

the necessary fare, — that is, cabin fare if they wished to go in the cabin, and deck fare if on deck.

The right to be carried is a right superior to the rules and regulations of the boat, and cannot be affected by them. If defendant had refused to carry the plaintiff generally, he would be liable, unless he could show some good excuse releasing him from the obligation. While this is a right that cannot be touched by rules and regulations, the accommodation of passengers while being transported is subject to such rules and regulations as the carrier may think proper to make, provided they be reasonable.

The right to be carried is one thing; the privileges of a passenger on board of the boat, what part of it may be occupied by him, or he have the right to use, is another thing. The two rights are very different. The latter, and not the former, right is subject to reasonable rules and regulations, and is, where such rules and regulations exist, to be determined by them. Hence the allegation we have already adverted to in the second count, as it relates to the accommodation of passengers while being transported, must be understood as a statement of a right that is subject to rules and regulations where they exist; and so far, therefore, as that count, in the statement of that right, conflicts with the defendant's notice, or the notice with it, the notice is a denial of the right itself, or, more properly speaking, an admission and avoidance of the *prima facie* case of the plaintiff.

The refusal to allow plaintiff the privilege of the cabin, on his tendering cabin fare, was nothing more or less than denying him certain accommodations while being transported, from which he was excluded by the rules and regulations of the boat.

All rules and regulations must be reasonable; and, to be so, they should have for their object the accommodation of the passengers. Under this head we include every thing calculated to render the transportation most comfortable and least annoying to passengers generally; not to one, or two, or any given number, carried at a particular time, but to a large majority of the passengers ordinarily carried. Such rules and regulations should also be of a permanent nature, and not be made for a particular occasion or emergency. In pleading, it is sufficient to state the rule or regulation; that plaintiff comes within it; and to aver its reasonableness. It is not necessary to spread upon the record the facts, which may be more or less numerous, that the party relies on to establish its reasonableness. It is otherwise where defendant refuses to carry the plaintiff generally. In such cases, the facts constituting his excuse, if he have one, must appear on the record, that the court

Day v. Owen.

may determine whether it be good or bad. But the reasonableness of a rule or regulation is a mixed question of law and fact, to be found by the jury on the trial, under the instructions of the court. It may depend on a great variety of circumstances, and may not improperly be said to be in itself a fact to be deduced from other facts. It is not to be inferred from the rule or regulation itself, but must be shown positively.

The notice states plaintiff is a colored person, and that, by the rules and regulations of the boat, colored persons were excluded from the cabin. The reasonableness of the rule, if it be reasonable, does not depend upon the color of the plaintiff, or on the class of persons to which he belongs, all of whom are alike excluded, but on the effect the carrying of such persons in the cabin would have, not on the defendant's business as a carrier, — although it might be to his advantage, — but on the accommodation of the mass of persons who have a right and are in the habit of travelling on his boat. As the duty to carry is imposed by law for the convenience of the community at large, and not of individuals except so far as they are a component part of the community, the law would defeat its own object if it required the carrier, for the accommodation of particular individuals, to incommode the community at large. He may do so if he chooses, but the law does not impose it on him as a duty. It does not require a carrier to make any rules whatever, but if he deems it for his interest to do so, looking to an increase of passengers from the superior accommodation he holds out to the public, to deny him the right would be an interference with a carrier's control over his own property in his own way, not necessary to the performance of his duty to the public as a carrier.

The second defence stated in the notice is, we think, a sufficient answer to the second count of the declaration. We also think it good as to the first count, which does not in terms make mention of the carrying of passengers on deck. It states defendant refused to carry the plaintiff in the cabin, and not that he refused to carry him generally, and seems to admit the carrying of passengers in other parts of the boat as well as in the cabin, and therefore does not make out a case of refusal to carry generally. The other questions raised on the argument it is not necessary to decide, as the one we have been considering disposes of the whole case.

The judgment below must be affirmed, with costs.

MARTIN, C. J., and CHRISTIANCY, J., concurred. CAMPBELL, J., did not sit in this case, having been of counsel for one of the parties.

Judgment affirmed.

 Supreme Court of Wisconsin.

2. THE SAME SUBJECT—EXCLUSION OF MALE PASSENGER FROM LADIES' CAR.

BASS v. CHICAGO AND NORTH-WESTERN RAILWAY COMPANY.*

*Supreme Court of Wisconsin, 1874.*HON. EDWARD G. RYAN, *Chief Justice.*

" ORSAMUS COLE,	} <i>Judges.</i>
" WILLIAM P. LYON,	

1. **Law and Fact—Reasonableness of Regulation reserving a separate Car for Ladies and their Attendants.**—The question of the reasonableness of regulations of a railway company affecting third persons is generally a mixed question of law and fact, and it is always proper to submit such a question to the jury, under instructions. Considered as a question of law, a regulation by which one car on each passenger-train is set apart primarily for the use of ladies, and gentlemen accompanying them, is eminently proper and reasonable.
2. **Enforcement of Regulation—Passengers must be supplied with Seats at all Events.**—Such regulation must be *reasonably enforced*. The continued validity of the regulation does not depend upon its being uniformly and indiscriminately enforced against *all* men not accompanied by ladies. If there be no sitting room in the regular passenger-cars for passengers excluded by such regulation from the ladies' car, and there be room to seat them there, they cannot be left standing without a breach of the contract of carriage.
3. **Duty of Obedience by Passengers to Proper Regulations.**—Passengers are bound to submit to the authority of the officers in charge of a railroad train, exercised upon the responsibility of the railroad company, in the enforcement of order upon the train and in the execution of reasonable regulations for the safety and comfort of passengers and the security of the train. Therefore, it is erroneous to charge that "if there was no room for him (the passenger) to sit in any of the cars except the smoking and ladies' cars, he had a right to enter the ladies' car although there was a regulation to the contrary," and to refuse an instruction to the effect that "if the plaintiff attempted to enter the ladies' car after being refused admittance to it, the defendant's servants had a right to use sufficient force to prevent him from entering."

APPEAL from the Circuit Court of Outagamie County.

The complaint averred, in substance, that on June 4, 1872, the plaintiff was received into one of the defendant's passenger-trains at Fond du Lac, to be conveyed as a passenger from that city to Appleton for the sum of \$1.45, which was paid; that there was no room in the passenger-cars, except the rear car, and the plaintiff was compelled to take passage in the rear car, or in the smoking-car, which was offensive; that after riding in the smoking-car to Oshkosh, he entered the rear car while the same was crossing the bridge over Fox River at Oshkosh; and that while crossing that bridge the defendant's servants, employed

* Reported, 36 Wis. 450.

Bass v. Chicago and North-Western Railway Company.

in the management of that train, forcibly seized him, and violently pushed and dragged him out of the car upon the platform, without any request to leave, or any explanation, thereby injuring his person and endangering his life. The answer denied most of these averments, and alleged, in substance, that the car into which the plaintiff entered was a ladies' car, set apart by a regulation of the company for ladies, and for gentlemen accompanying ladies, as the plaintiff knew; that the plaintiff was informed before entering that he could not go into said car, and was requested to take a seat in the car next in front of the ladies' car, in which there were vacant seats; and that the defendant's servants used only so much force as was necessary to remove the plaintiff.

At the opening of the trial, the defendant's counsel objected to the introduction of any evidence, on the ground that the complaint did not state a cause of action; but the objection was overruled. The evidence for the plaintiff tended to prove the allegations of the complaint as above stated; that at Oshkosh, when the plaintiff sought admission to the rear car, he found the door locked, and stood on the platform until the train was starting, when a brakeman and a friend of his came on the platform; that the brakeman unlocked the door and admitted his friend, and stepped to one side, when the plaintiff passed in, and when going down the aisle he was seized by the brakeman, who attempted to pull him out, and afterwards succeeded by the aid of another person; that the bridge was an open one, and a person falling from the train would be likely to fall into the river; that the plaintiff's hand and arm were cut and bruised in the scuffle, and his ring and cane broken; that he knew the rear car was designated as a ladies' car, but had ridden in that car, and known others to ride in it, unaccompanied by ladies, many times. Evidence was introduced, under objection, tending to show that it was customary for the brakeman to admit gentlemen without ladies to this car, on receiving a little money or other consideration; that the smoking-car was rudely furnished with wooden seats, and was a second-class car; that there was only one other car besides the ladies' car; and that the latter was not full, but all the seats of the other car were filled.

The evidence for the defence tended to show that the rear car was set apart for ladies and for gentlemen accompanying them; that it was the custom, when the brakeman knew there was no room in other cars, from his own observation, to allow gentlemen to go into the ladies' car; that this regulation was for the protection of ladies, and its enforcement rested somewhat in the discretion of the brakeman; that at the time of the difficulty there were vacant seats in the gentlemen's car; that the plaintiff was notified by the brakeman not to go into the ladies'

 Supreme Court of Wisconsin.

car, and was requested to take a seat in the other car or to wait until the conductor came; and that the person who assisted in pushing the plaintiff had nothing to do with the train.

The court charged the jury, among other things, in substance, that the regulation excluding gentlemen unaccompanied by ladies from the ladies' car, while there were sufficient room and comfortable seats in other cars, and that admitting others into that car when the brakeman knew that the other cars were crowded, was a reasonable one, and that the company might reasonably enforce it. "But to entitle the company so to enforce the regulation, I think it should have been observed and kept by the company itself; and that, if you find from the evidence that the company, by its officers, at and before the time when the plaintiff was a passenger as shown in this case, was in the daily habit of disregarding the regulation, by allowing persons other than ladies, and gentlemen accompanied by ladies, to ride in that car, then the company cannot insist that such other persons so allowed to enter that car were not lawfully entitled to their seats therein."

The instructions given and refused as to the right of the plaintiff to enter the ladies' car are sufficiently stated in the latter part of the opinion.

Verdict for the plaintiff for \$4,500, and judgment accordingly; from which the defendant appealed.

William Ruger, for appellant; *Tay'or & Sutherland*, for respondent.

RYAN, C. J. — The learned judge of the court below charged the jury that the appellant's regulation setting apart a car in each passenger-train primarily for the separate use of women, and men travelling with them, is a reasonable one. He did not submit the question to the jury, and both parties appear to have assented to the instruction.

The general rule to be found in the books is that the reasonableness of such regulations is a mixed question of law and fact, to be submitted to the jury under proper directions.¹ And at least one court, pointing the distinction between by-laws of a corporation affecting the corporators only, and regulations affecting third persons, has held that the reasonableness of such by-laws rests in their lawfulness, and is therefore a pure question of law; while the lawfulness of such regulations rests in their reasonableness, and is therefore a pure question of fact.² We cannot think that the latter proposition is well-founded in principle or sustained by authority, as applied to regulations affecting passengers by railroad *in transitu*. Many cases, without passing expressly on the

¹ 1 Redf. on Rys. 88.

² The State v. Overton, 24 N. J. L. (4 Zab.)

435; Morris etc. R. Co. v. Ayres, 29 N. J. L.

393.

 Bass v. Chicago and North-Western Railway Company.

point, deal with the propriety of such regulations as with a question of law. Even in the case in 4 Zabriskie, the court does so *arguendo*. Perhaps it is practically so in plain cases; for courts would not hesitate to overrule the findings of juries against their own clear views of the reasonableness or unreasonableness of such regulations. But there may well be cases of doubt, largely of the nature of questions of fact, in which courts would not be justified in declining to take, or in disregarding, the finding of the jury. It may be said to partake of the character of debatable ground between court and jury, and is so properly held to be a mixed question of fact and law.¹ And it is always proper to submit the question, under instructions, to the jury.²

In this case, regarding it in the light of a question of law, we entirely concur with the court below in the opinion that the regulation in question is an eminently reasonable and proper one.

In *Jencks v. Coleman*, Mr. Justice STORY likens the duties of carriers of passengers by steamboat to those of innkeepers. And in *The Commonwealth v. Power*, SHAW, C. J., after saying that the owners of steamboats and railroads are in this respect on the same footing, adds: "An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order."

This authoritative comparison of the duties of railroad companies to their passengers to those of innkeepers to their guests is very suggestive of the scope of the former.³ And of course the power to regulate must be commensurate with the duty to care for and protect.⁴

The use of railroads for the common carriage of passengers has not only vastly increased travel generally, but has also specially led women to travel without male companions. To such, the protection which is a natural instinct of manhood towards their sex is specially due by common carriers.⁵ And in view of the crowds of men of all sorts and

¹ *The Commonwealth v. Power*, 7 Metc. 596; *Day v. Owen*, 5 Mich. 520; *s. c. ante*, p. 306.

² *Jencks v. Coleman*, 2 Sumn. 221; *s. c. ante*, p. 11.

³ See *Day v. Owen*, *ante*, p. 306; *Jencks v.*

Coleman, *ante*, p. 11; *Chamberlain v. Chandler*, 3 Mason, 242; *Nieto v. Clark*, 1 Cliff. 145.

⁴ 1 Redf. on Rys. 88-92.

⁵ *Chamberlain v. Chandler*, and *Nieto v. Clark*, *supra*.

Supreme Court of Wisconsin.

conditions and habits constantly travelling by railroad, it appears to us to be not only a reasonable regulation, but almost if not quite a humane duty, for railroad companies to appropriate a car of each passenger-train primarily for women, and men accompanying them, from which men unaccompanied by women should be excluded, and even women, or men accompanying women, of offensive character or habits; so as to group women of good character on the train together, sheltered as far as practicable from annoyance and insult. It is a severe comment on our civilization that such a regulation should be necessary, but the necessity is patent to all experience and intelligence. And the regulation not only comes within the principle established in all the cases we have examined, but has judicial sanction.¹

It is not enough that the regulation is reasonable: it must be reasonably enforced. And we are unable to agree with the learned judge of the court below, in the opinion that such a regulation, to remain valid, must be strictly and uniformly enforced. We cannot think that the occasional use or even abuse of a discretion to admit into the ladies' car persons not admissible under the letter of the regulation, can operate to abrogate the regulation itself. There may well be cases of age, or infirmity, or other ground of discrimination in which the regulation need not be rigidly enforced. And the regulation, for the convenience of some passengers, should not be enforced to the violation of the rights of other passengers. Railroad companies have no right to overcrowd their trains to the inconvenience of passengers.² Passengers are entitled to seats, and it is the duty of the officials of the train to see that they have them. If passengers appropriate more than one seat each, leaving others without seats, it is not the duty or the right of the latter to wrangle or struggle with the former for seats; it is the duty of the proper officers of the train to regulate that. It is essential that good order should prevail on every passenger-train; and it is not likely always to prevail on crowded trains, if the dignitaries of the train leave the passengers to shift and scramble for themselves. And if there be not sitting room for passengers excluded by the regulation from the ladies' car, and there be room to seat them there, they cannot be left standing without breach of the contract of carriage. But, in such case, in the admission of male passengers into the ladies' car, the object of the regulation must be regarded and observed, and it must necessarily rest in the discretion of the proper officials of the train to select

¹ The State *v.* Overton, 24 N. J. L. 435;
Pittsburgh etc. R. Co. *v.* Hinds, 53 Pa. St. 512;
s. c. ante, p. 295.

² 2 Redf. on Rys. 217; Pittsburgh etc. R.
Co. *v.* Hinds, *ante*, p. 295.

Bass v. Chicago and North-Western Railway Company.

those to be admitted. This discretion must be somewhere; and the good order of the train and the object of the regulation are not compatible with the choice of passengers to make their way, at will and without license or excuse, into a car from which the regulation primarily excludes them. In such cases, as in others, it would not comport with the comfort and convenience of the passengers, nor always with their safety, for some of them to assert their rights with a strong hand. And the safety and comfort of the passengers generally are not to give way to the safety or convenience of one or a few.¹ For all violations of their rights as passengers, all passengers have their remedy by action on the contract of carriage; but they must submit to the necessary and reasonable discipline of the train.

“When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. The personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of *gross*.”² “The right and duty of the defendant, in running the road, to establish and enforce reasonable regulations for the government of the line has been frequently recognized by the courts in this country. The safety and security of the travelling public, as well as the interest of the railroad itself, require that the right and duty exist and be enforced. Upon that ground it has been held that the defendants and their servants may not only exclude those who refuse to pay their fare, or to comply with such reasonable regulations as are made for their government, but they may also rightfully inquire into the habits or motives of those who claim the right of passage. While the law requires of the company the adoption of such regulations as are necessary for the safety and convenience of passengers in their trains, they have also the right to adopt such reasonable regulations as are necessary for their own security; and those regulations are to be mutually observed. If they are not complied with by passengers, the company may not only refuse them admission within their cars, but, if they are within, they may remove them.”³

These views are sanctioned by many reported cases; and they impose great responsibility on railroad companies, and devolve great correlative power upon officers in charge of passenger-trains. These officers may be guilty of acts of arbitrary oppression, beyond endurance, towards

¹ Day v. Owen, *ante*, p. 306.

² Philadelphia etc. R. Co. v. Derby, 14 How. 468; s. c. *ante*, p. 31.

³ Stephen v. Smith, 29 Vt. 160.

Supreme Court of Wisconsin.

passengers, which might warrant resistance. But we feel warranted by principle and authority to hold, that in the enforcement of order on the train, and in the execution of reasonable regulations for the safety and comfort of the passengers and for the security of the train, the authority of these officers, exercised upon the responsibility of the corporations, must be obeyed by passengers, and that forcible resistance cannot be tolerated. They act on the peril of the corporation and their own. Indeed, as that fictitious entity, the corporation, can only act through natural persons, its officers and servants, and as it of necessity commits its trains absolutely to the charge of officers of its own appointment, and passengers, of necessity, commit to them their safety and comfort *in transitu*, under conditions of such peril and subordination, we are disposed to hold that the whole power and authority of the corporation, *pro hac vice*, is vested in these officers; and that as to passengers on board, they are to be considered as the corporation itself; and that the consequent authority and responsibility are not generally to be straitened or impaired by any arrangement between the corporation and the officers; the corporation being responsible for the acts of the officers in the conduct and government of the train, to the passengers travelling by it, as the officers would be for themselves if they were themselves the owners of the road and train. We consider this rule essential to public convenience and safety, and sanctioned by great weight of authority.¹

On the trial in the court below there was evidence tending to show that the respondent, being a passenger on the appellant's train, to which a ladies' car was attached, was, with other male passengers, kept by the officers of the train without a seat, there being no unoccupied seats except in the ladies' car; that he had been in the smoking-car, in which he was not bound to remain; and that he and others stood for some time in one of the ordinary passenger-cars without attention from the officers of the train. If these were the facts, without some special excuse for the neglect, it is plain that the officers of the train were guilty of a breach of duty to the passengers so left standing. There was evidence tending to show that the respondent then went to the

¹ The Commonwealth v. Power, 7 Metc. 596; Day v. Owen, *ante*, p. 306; Jencks v. Coleman, *ante*, p. 11; Pittsburgh etc. R. Co. v. Hinds, *ante*, p. 295; Phila. etc. R. Co. v. Derby, *ante*, p. 31; Chamberlain v. Chandler, 3 Mason, 242; Nieto v. Clark, 1 Cliff. 145; Stephen v. Smith, 29 Vt. 160; Moore v. Fitchburg R. Co., 4 Gray, 465; Vinton v. Middlesex R. R., 11 Allen, 304; *s. c. ante*, p. 6; Coleman

v. New York etc. R. Co., 106 Mass. 160; Sullivan v. Phila. etc. R. Co., 36 Pa. St. 234; Pennsylvania R. Co. v. Vandiver, 36 Pa. St. 298; Sherley v. Billings, 8 Bush, 147; Higgins v. Watervliet Turnpike Co., 46 N. Y. 23; Baltimore etc. R. Co. v. Blocher, 27 Md. 277; Chicago etc. R. Co. v. Parks, 18 Ill. 460; *s. c. post*, p. 319; Goddard v. Grand Trunk R. Co., 57 Me. 202. See 2 Redf. on Rys. 220, 230.

Bass v. Chicago and North-Western Railway Company.

ladies' car for a seat; that he found the door at first locked; but that on its being unlocked by a brakeman, he entered, or attempted to enter, the car. Whether he entered the car peaceably and without being forbidden to enter it, or whether he was forbidden and attempted to enter the car forcibly, were questions on which the evidence was conflicting; and, under the instructions given to the jury, the verdict does not determine the fact. In either case, it does appear that he was forcibly driven upon the platform of the car while the train was crossing a river, when a fall from the platform would probably have proved fatal to him.

In the circumstances stated, if such were the truth, we cannot think that the respondent was bound to wait the slow pleasure of the officials of the train to give him a seat, if the ladies' car was open to his peaceable entrance. If so open, we think that he might well enter it for a seat; for, as we have said, the regulation for convenience should give way to the right of contract. And if the officers of the train neither furnished him with a seat nor forbade or barred his entrance into the ladies' car, we are inclined to regard it as equivalent to their license to him to enter it. But if his entrance were barred or forbidden, we cannot hold that he could of right attempt by force to enter the car. If, however, being neither barred nor forbidden, he entered the car peaceably, and was peaceably in it, where there was a seat for him, to which he was entitled, and which he could not find elsewhere, we hold that he was there rightfully. Being there rightfully, under his contract of carriage, we cannot recognize any right of any officer of the train to remove him by force; certainly not without proffering him a seat elsewhere. And we deem it our duty to say that no circumstances could have justified the brakeman, if such were the fact, in violently throwing the respondent on the platform while the train was moving over the bridge. Some discretion and humanity are as essential to such persons as zeal, due or undue.

The questions of fact as to the entrance of the respondent into the car, and the manner of it, as we have stated them, and on which the respondent's right to recover largely depends, do not appear to us to have been properly submitted to the jury, with proper instructions to guide them in their finding.

On the contrary, the learned judge refused the appellant's request to charge the jury that if the respondent attempted to enter the ladies' car after being refused admittance to it, he was a wrong-doer in it and the appellant's servant had a right to use sufficient force to prevent him from entering the car. And he did charge the jury that if there

 Supreme Court of Illinois.

was no room for the respondent to sit in any of the cars except the smoking and ladies' cars, he had a right to enter the ladies' car, although there was a regulation to the contrary.

The instruction refused and the instruction given make it manifest that the learned judge was of opinion that, being without a seat in the other cars, the respondent had a right to enter the ladies' car by force, after being forbidden to enter it. There was no qualification of the charge given. And the jury must have understood it as we do.

With the views which we have already expressed, we have no choice but to hold this charge to have been erroneous, and to reverse the judgment of the court below and remand the cause for a new trial.

So ordered.

3. DISCRIMINATION BETWEEN PRICE OF TICKETS AND FARES PAID ON THE TRAIN.

CHICAGO, BURLINGTON, AND QUINCY RAILROAD COMPANY *v.*
PARKS.*

Supreme Court of Illinois, 1857.

HON. WALTER B. SCATES, *Chief Justice.*

“ JOHN D. CATON, } *Judges.*
“ ONIAS C. SKINNER, }

1. **Discrimination between Price of Tickets and Fares paid on the Train.**—Passengers who neglect to purchase tickets at stations before embarking on the train may be charged additional fare, if proper conveniences and facilities are furnished them for procuring tickets. If a passenger pays on the train from one station to another, he may be compelled to pay the extra charge again, if he desires to proceed further, unless he procures a ticket to such destination. The first contract of carriage terminates with the distance paid for.
2. **Where Passengers may be expelled.**—In Illinois, the statute prohibits the expulsion of a passenger at other than some usual stopping-place.
3. **Measure of Damages for Unlawful Expulsion.**—A passenger who, without any difficulty, is put off from a train between stations for non-payment of fare, sustains a technical injury, for which he may bring an action; yet where there is no improper conduct on the part of the officers in charge of the train, nor any peculiar circumstances to justify it, a thousand dollars must be regarded as excessive damages for the act.

APPEAL from Kane.

Parks, who is an attorney, sued the appellant in case, averring that the appellant was the owner of a railroad passing from Aurora in Kane

* Reported, 13 Ill. 460.

Chicago, Burlington, and Quincy Railroad Company v. Parks.

County, through Batavia, to Junction in Du Page County; that he took passage on board the cars of the company from Aurora to Junction aforesaid, and was wrongfully expelled therefrom by the conductor of the train. There were three counts in the declaration, not materially variant; the third count averred that Parks was expelled from the cars at a place which was not one of the usual stopping-places of the trains of the appellant's cars. To this declaration there was a plea of the general issue, at February term, 1857, of the Kane Circuit Court, I. G. WILSON, judge; there was a trial by jury, and a verdict and judgment for the plaintiff below for \$1,000.

A motion for a new trial was denied.

Sedgwick and Walker, for appellant; *O. D. Day, E. Leland, and W. H. Wallace*, for appellee.

CATON, J. — Several questions of considerable public importance arise upon this record, and have been considered by this court. The railroad company has the right by its charter to fix the tariff or fare which it shall receive for carrying passengers and freight upon its road. These charges, however, must be uniform; that is, the charge should be the same for all persons similarly situated, and for all freights of a like kind and quality, for a given service. They may divide passengers and freights into classes, with descriptive distinctions, and charge different rates for different classes, for a given service, but the charge should be uniform upon all persons and freights embraced within each class. Thus may every one know what he has to pay, beforehand, for passage or freight, by inspecting the table of classes and charges fixed by the company. They may not say that they will charge A. twice as much as they do the public in general. While they show favor to individuals or classes, by carrying them free, or for half-price, if they choose, they cannot be allowed to arbitrarily oppress an individual by charging him an unusual price, simply because it is he. Also, tariffs of charges may, under the same rule of uniformity, be changed at the pleasure of the company. Nor do we think it unreasonable or unjust that the company should charge more for passengers who neglect to get tickets, and in consequence compel the conductor to collect their fares in the cars. This is but a reasonable penalty for the neglect of the passenger, and a just compensation to the company for the additional inconvenience to which they are subjected by being compelled to receive the fare by the hands of the conductor. That it is sensibly and appreciably more to the advantage of the company to have their fares paid to their station-agents, who issue tickets therefor, than to their conductors, our common observation has convinced us. But to justify the

Supreme Court of Illinois.

company in making this discrimination in the fare against the passenger who neglects to purchase a ticket at the company's office, the company must see to it that the fault was not that of its own agent, instead of the passenger. To justify this discrimination, every reasonable and proper facility must be afforded the passenger to procure his ticket. They must furnish a convenient and accessible place for the sale of the tickets, with a competent person in attendance ready to sell them, which should be open and accessible to all passengers, for a reasonable time before the departure of each train, and up to the time of its actual departure, so that it shall really be a case of neglect, and not of necessity, on the part of the passenger, and not the fault of the company. If a company will keep its ticket-office closed till a crowd of clamorous passengers have gathered around, so as to make it dangerous or inconvenient for females or infirm persons to get tickets, surely the fault is not theirs, but the company's, if they do not procure tickets; and, under such circumstances, to charge them more than the price established for tickets would be but an imposition and an outrage which the law cannot sanction.

We have been led to these suggestions upon the reasonable facilities to be afforded to the passengers to procure tickets, not only from very common complaints, which sometimes, no doubt, are well founded, that agents too often delay opening their offices till too near the time for the departure, but the evidence in this case shows that the usual habit of the agent at Batavia, the place where the passenger should have got his ticket, was such as to have prevented the plaintiff from procuring a ticket in this case. He swears that his rule was to keep his ticket-office open till it was time for the train to arrive, and that he did not keep it open till the departure of the train, unless he chose to, or if he had any thing else to do. Had such been the case on the morning in question, it would have been impossible for the plaintiff to have procured a ticket, for he came in on the cars, and consequently could not well buy a ticket at the office before the arrival of the train. Had he gone to the ticket-office and found it closed, we should not hesitate to say that the fault was the ticket-agent's, and not his, and that, having done all he could to procure a ticket, he was entitled to be transported at the ticket fare. Otherwise, the company would be allowed to take advantage of its own wrong or that of its servant, and make the party without fault pay them for it. The evidence, however, in this case shows that the ticket-office was open, and the agent ready to sell tickets during the whole time the train was at the station; so that it was the fault of the plaintiff, and not of the company, that he did not procure a

Chicago, Burlington, and Quincy Railroad Company v. Parks.

ticket, if it was his duty to procure one. This at once leads us to that question, as arising out of the facts in this case.

It appears that the plaintiff took passage on the cars at Aurora, without a ticket, and paid the conductor, when called on in the cars for his fare, the regular price to Batavia, to which place he took and paid for a passage. He paid the five cents more than the price of a ticket for the same passage, according to the rules established by the company. No complaint or remonstrance seems to have been made to the payment of the five cents more than the price of a ticket for the passage to Batavia, which was the destination for which he first started. While the train remained at Batavia, the plaintiff concluded to go on to Junction, which is the next station, and took passage for that point without having obtained a ticket. After the train had started, the conductor applied to the plaintiff for his fare, who tendered him twenty cents, which was the price of a ticket; but the conductor demanded of him twenty-five cents, which was the price fixed by the rules of the company for the fare from Batavia to Junction when it is paid to the conductor. The plaintiff claimed that as he had already paid the extra five cents on his passage from Aurora to Batavia, he was not bound to pay an additional five cents on the route from Batavia to Junction, while the conductor claimed he must pay the conductor's fare in both cases. In this we have no doubt the conductor was right. At first the plaintiff took passage for and paid his fare to Batavia. When that journey was accomplished that contract was at an end, and all connection and responsibility between the parties, so far as the first payment, or the contract growing out of it, was concerned. When the plaintiff again got on to the cars at Batavia and started for Junction, a new journey was commenced, as independent of the other, which had already been fully performed, as if he had come over that part of the road the day before, or even as if he had never been on the cars of the company before. A new contract had to be made, as much as if another passenger had got on at Batavia instead of the plaintiff. For the two passages the conductor had to make two reports and separate entries, as much as if the two journeys had been performed by two passengers. The conductor, then, was right in demanding the regular fare established by the rules of the company, and the plaintiff occupied the position of one upon the cars refusing to pay the regular fare, which, by taking his seat in the cars without a ticket, he had impliedly agreed to pay. And the question then arises, What were the rights of the parties under such circumstances? What was it then the duty of the conductor to do?

Supreme Court of Illinois.

These, we think, are definitely established by the thirty-fourth section of the law providing for a general system of railroad incorporations, which is this: —

“If any passenger shall refuse to pay his fare or toll, it shall be lawful for the conductor of the train and the servants of the corporation to put him out of the cars at any usual stopping-place the conductor shall select.”

It is objected, first, that the company had the right to remove persons from the cars who refuse to pay their fare, before the passage of this law, and as this statute does not in terms forbid the putting out of such a person at any convenient and safe place other than a usual stopping-place, the right which is claimed formerly to have existed to put the passenger out at other than the usual stopping-places still remains unimpaired by the act. This we do not think a sound construction of the act. It was the evident intention of the Legislature to regulate the subject of which the section treats, without reference to the question whether it abridges or enlarges previously existing rights. It means this or it means nothing. Such, we have no doubt, is the sound construction of the act.

It is next objected that as this company was incorporated, not under this general law, but by special law passed long before, we ought not to hold that it was the intention of the Legislature to make this section applicable to it. This question of intention is settled by the last section of the same act, which says: —

“All existing railroad corporations within this State shall respectively have and possess all the powers and privileges, and be subject to all the duties, liabilities, and provisions contained in this act, so far as they shall be applicable to their present conditions, and not inconsistent with their several charters.”

This thirty-fourth section is certainly as applicable to one road as another; and if the Legislature had the right to impose such a regulation upon companies already in existence, there can be no doubt that it intended to do so. We held, in the case of *The People v. Wilson*,¹ that, under this last section, this very railroad company might claim a benefit under this same act. And in the case of *Galena and Chicago Union Railroad Company v. Loomis*,² we held that the thirty-eighth section of the same act was applicable to and binding upon that company. That section requires each locomotive to be provided with a bell or whistle, which shall be sounded at road-crossings. That company was incorpo-

Chicago, Burlington, and Quincy Railroad Company *v.* Parks.

rated by a special law, before the passage of this general law, and hence was situated, in that respect, the same as this company. There is nothing in the charter of this company which says any thing about its right to put passengers out of its cars for refusing to pay fare, but that right is claimed as an incident to and as a means of enforcing the right to collect fare, so that the regulation in question does not interfere with any express grant of power contained in the charter. It does not interfere with the right to collect toll from passengers, for they may demand the toll of all persons before they allow them to take their seats in the cars, or, after the service is performed, they may sue and recover the fare of the passenger. But after the company has allowed the passenger to take his seat in the cars and started with him without demanding the toll and without objection, it provides that he shall not be thrust out except at a regular stopping-place. This was, no doubt, deemed essential by the Legislature to the safety of the travelling public, rather than leave it discretionary with every conductor to say arbitrarily what is a safe and proper place to put the passenger off; and when we reflect that among the great multitude of conductors necessarily employed throughout the State, with the utmost caution on the part of the companies, it is almost inevitable that some will want discretion, while others may be influenced by passion, or, worse still, an exaggerated notion of their authority and a morbid ambition to display it, we cannot say that the Legislature acted unwisely in prohibiting them altogether from putting off passengers for the non-payment of fare, at other than usual stopping-places. The case may, and, no doubt, often will happen, that a person may very innocently and unintentionally find himself without the means of paying his fare,—as, where the money he has unexpectedly turns out to be uncurrent, or, when he looks for his money to pay his fare, he finds he has been robbed.

I venture the assertion now, that if the conductors were to adhere to the positive requirements of our statute which prohibits the receiving of bills of banks out of the State of less denomination than \$5, they would in every train find more or less persons of respectability and character who had taken their seats without a doubt of their ability to pay their fare, who were entirely unable to do so; and yet, in refusing to take such money, no one can doubt that the conductor would be exercising a strict legal right, and, I may say, duty, for it is the duty of all to obey that, as well as all other laws, so long as it remains in force. It was impossible for the Legislature to distinguish between such cases and those where the passenger fraudulently takes his seat and then refuses to pay; and rather than leave it to the discretion of the conductor, it

Supreme Court of Illinois.

was deemed proper, for the protection of the travelling public from even occasional abuse, to provide that passengers should only be put off at usual stopping-places for refusal to pay the fare, for that is the effect of the provision.

This is complained of in the argument as a hardship, and as practically compelling the company to carry all persons who take their seats from one station to another; for, ordinarily, the train could not be run back to the station where the passenger got on, without getting behind time. Under the present system of allowing all persons to take their seats in the cars without tickets and without paying their fare, this may be so, and such an effect is certainly to be regretted; but it is not impossible to obviate the difficulty by requiring prepayment, although it may not be improbable that the introduction of such a system in this country at the present time would be attended with great difficulties. But, be this as it may, we cannot doubt the power of the Legislature to pass the law in question, if they deemed the public safety required it. The result is that, in this case, the conductor had a right to remove the plaintiff from the cars because he refused to pay the fare which he was authorized to demand; but he was not authorized to put him off at the place where he did, which was not a usual stopping-place, but from forty rods to half a mile from the Batavia station. The statute made it his duty either to run back to that station, or to take him on to the next. Had he taken him on to Junction, which was the next station, the company would have had a right of action for the fare, which, however inadequate in fact, would be all the relief the law could afford in such a case, as well as in all others where services are rendered for which the party refuses to pay the just compensation.

For putting the plaintiff off the train at a place not allowed by law, a technical wrong was done him, for which he undoubtedly had a right to bring this action, and to recover such damages as he sustained for the wrong done him. The jury allowed him \$1,000 for those damages, which the Circuit Court refused to set aside, and this decision is also assigned for error. We cannot hesitate to say that the damages allowed are grossly, not to say outrageously, excessive. Although in a case of this kind this court will interfere with a verdict with great reluctance, yet we will not hesitate to do so where it is apparent, at first blush, that the jury have misapprehended the law of the case, or misunderstood the facts, or else have been influenced by their passions or their prejudices rather than the law and the facts. It is not the duty of courts to enforce the arbitrary edicts of juries, but it is their duty to firmly and fearlessly stand between the party and the

Chicago, Burlington, and Quincy Railroad Company v. Parks.

jury whenever it is manifest that the party has been made a victim to their prejudices. In this class of cases great latitude should no doubt be allowed to juries in their estimate of the damages, but to this there must be a limit; and should we refuse to interfere in this case, it would be equivalent to saying to juries, in all cases of this kind, We will shut our eyes to the facts of the case, and let you work your will with all parties placed in your hands. Now, do with them as you please; we will not interfere.

What are the facts which the jury were bound to consider in estimating the amount of damages to which the plaintiff was entitled? The plaintiff had refused to pay the fare, which it was his duty to pay, and it became the right and the duty of the conductor to remove him from the cars. This he did in as kind and courteous a manner as practicable, without violence or harshness and without insult or contumely. The refusal of the plaintiff to pay the fare was not a matter of necessity, for a friend offered to pay the additional five cents, which he would not allow to be done; but he chose rather to vindicate what he no doubt supposed was his right, in which, however, we have seen he was mistaken, for the controversy between him and the conductor was about the five cents, and not about the place where he should be left. His refusal to pay his fare was from his will, and not from want. He chose rather to be put off the cars than to allow another to pay the disputed five cents, which he was in law bound to pay. Thus, by his own illegal act, he subjected himself to all the mortification consequent upon the transaction, for the mortification consists in being removed from the cars, and not in the place of removal. A sensitive mind would have been quite as much pained had the train run back to the depot, and he had been expelled in the presence of the by-standers as well as the passengers, as to have the removal take place, say, eighty rods from the depot; and yet had the conductor done so, no wrong would have been done to the plaintiff, and he would have had no cause to complain. Of what, then, could he complain? In what respects were his rights violated? In this alone: that he was put off the cars, say, eighty rods from the depot, instead of at the depot. He was entitled to recover whatever damages which he sustained by being put off at that place instead of at the depot. But it rained at the time, and he had to walk back in the wet. There is no evidence that he took a cold, or in any way became indisposed in consequence; but, on the contrary, the evidence shows that he was found some few hours afterward at his place in court at Geneva, some two or three miles from Batavia, so that there were no special damages resulting from that, more than the discomfort and inconvenience

Supreme Court of Illinois.

of it. There is no evidence showing malice on the part of the company or the conductor. He performed his unpleasant task with evident reluctance, and without ostentation or arrogance, or display of authority; and, so far from there being evidence of enmity between the parties, the testimony would lead to the conclusion that a friendly relation existed between them.

From the whole evidence in the case, we cannot avoid the conclusion that each supposed he was right in the dispute about the amount of the fare, and each chose to stake the consequences and take the responsibility of acting upon his own judgment; and it turns out that the plaintiff was wrong and the conductor was right. Nor is there any thing in the case to lead to the conclusion that the conductor put the plaintiff off where he did, instead of at a usual stopping-place, for the purpose of annoying him or discommoding him, when he knew that it was his duty to take him to some regular stopping-place. No question or controversy was made as to the place, but the whole question between them was as to the right. As a matter of law, it was no doubt the duty of the conductor to have known of this statute, and to have obeyed it; but it does not follow that his ignorance and violation of it are evidence of malice, for which smart-money or exemplary damages should be inflicted upon the company.

Now, in view of all these circumstances, can any impartial and unprejudiced mind for a moment tolerate the supposition that the plaintiff was entitled to \$1,000 damages, when by his own wrongful act he had subjected himself to the liability of being expelled from the cars rather than allow a friend to pay the fare for him, which it was his duty to have paid, and the only real ground of complaint which he has is that he was put off a short distance from the depot instead of at the depot? The very statement of the proposition is startling, and carries conviction to the mind at once that the jury were led to find their verdict, not from the facts alone, and the law as applicable to those facts. It may be, and probably is the case, that the jury supposed that the conductor was wrong in the amount of his charge, and that they viewed the plaintiff in the light of a sacrifice to principle, and that he had been outraged when manfully resisting oppression and wrong. Without some such considerations as these, we cannot suppose that the jury honestly arrived at the verdict which they rendered. But such a view of the case, we have seen, was not warranted by the law and the facts. The mere supposition or belief of the plaintiff himself that he was all in the right, and that he was submitting to wrong for the sake of defending a principle, did not entitle him to that position when

Dunn v. Grand Trunk Railway.

he, in fact, was in the wrong. The honesty of his purpose could not put the other party in the wrong when he was, in truth, in the right.

This verdict cannot, upon principle, be sustained. To uphold it would not only be doing a great wrong to the defendant in this particular case, but, as a precedent, would be doing an infinitely greater wrong to the community, who might suffer by it.

The judgment must be reversed and the case remanded, upon the ground alone that the damages are excessive.

Judgment reversed.

4. PASSENGERS UPON FREIGHT-TRAINS NOT PRESUMED TO HAVE KNOWLEDGE OF REGULATIONS FORBIDDING THEIR PRESENCE THERE.

DUNN v. GRAND TRUNK RAILWAY.*

Supreme Judicial Court of Maine, 1870.

HON. JOHN APPLETON, LL.D., *Chief Justice.*

“ JONAS CUTTING, LL.D.,†	}	<i>Judges.</i>
“ EDWARD KENT, LL.D.,		
“ CHARLES WALTON,†		
“ JONATHAN DICKERSON, LL.D.,		
“ WILLIAM G. BARROWS,		
“ CHARLES DANFORTH,†		
“ RUFUS TAPLEY,		

If a passenger enters the caboose-car of a freight-train, and when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, the corporation incurs the same liability for his safety as if he were in their regular passenger-train.

ACTION by Dunn against the Grand Trunk Railway Company, for injuries received July, 1868, while riding on defendants' railroad. At the time of the accident, plaintiff was riding in the saloon-car of a freight-train. At the trial, it appeared that the company issued a notice. May 23, 1866, that “passengers would not be allowed to travel by freight-train on that part of the line between Portland and South Paris.” By notice September 8, 1868, the company made public the following rule: That “no passenger will be carried in the brake-vans attached to freight-trains without written authority from the superintendent.

* Reported, 58 Me. 187.

† Not sitting.

Supreme Judicial Court of Maine.

* * * Any conductor allowing a passenger to travel in the brake-van, or on any part of the freight-train, will be dismissed." The part of the road mentioned in the first notice was that whereon plaintiff was travelling. The conductor made no objection, and collected fare as from a first-class passenger. The verdict was for plaintiff, and defendants appealed.

P. Barnes, for appellants; ¹ *T. H. Haskell*, for appellee.

APPLETON, C. J. — The defendants are common carriers of passengers and freight. They may carry freight in their passenger-train, or passengers on their freight-train. They have a right to make all reasonable rules and regulations in the management of their business, with which those in their employ, or those making use of their means of conveyance, are bound to conform when informed of their existence.

By one of the regulations of the defendant corporation, after May 23, 1866, passengers were not "allowed to travel by freight-trains on that part of the line between Portland and South Paris." The regulation was a reasonable one, and the defendants were authorized to make it. It is, however, fairly inferable from the regulation itself that previously passengers had been permitted to travel by the freight-train. By the notice of September 8, 1868, dated at Montreal, no passengers were to be carried in the brake-vans attached to freight-trains "without written authority from the superintendent." And "any conductor allowing a passenger to travel on the brake-van, or any part of the freight-train, will be dismissed."

The plaintiff went aboard the freight-train, in the saloon-car, and was there with the knowledge of the conductor. It was the duty of the conductor to inform him of this regulation, if it was to be enforced, and request him to leave. If no notice was given of this rule, and no request to leave, but instead thereof the usual fare was received, he had a right to suppose himself rightfully on board, and entitled to all the rights of a passenger. Every one riding in a railroad car is, *primâ facie*, presumed to be there lawfully as a passenger, having paid, or being liable when called on to pay, his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser.² If not being rightfully on board, and being advised thereof, the plaintiff neglected or refused to leave, the conductor had a right to remove him, using no more force than was necessary to accomplish that object.³

¹ Cited *Lygo v. Newbold*, 9 Exch. 302; *Lucas v. Taunton etc. R. Co.*, 6 Gray, 70; *Robertson v. New York etc. R. Co.*, 22 Barb 91; *Cleveland etc. R. Co. v. Bartram*, 11 Ohio St. 457.

² *Pennsylvania R. Co. v. Books*, 57 Pa. St. 346.

³ *Fulton v. Grand Trunk R. Co.*, 17 Upper Canada Q. B. 428; *Hilliard v. Gould*, 34 N. H. 230; *The State v. Gould*, 53 Me. 279.

Dunn v. Grand Trunk Railway.

The regulations of the defendant corporation are binding on its servants. Passengers are not presumed to know them. Their knowledge must be affirmatively proved. If the servants of the corporation, who are bound to know its regulations, neglect or violate them, the principal should bear the loss or injury arising from such neglect or violation, rather than strangers. The corporation selects and appoints its servants, and it should be responsible for their conduct while in its employ. It alone has the right and the power of removal.

A passenger goes on board a freight-train, enters the saloon-car, and remains there when the train starts, against the rules of the company but with the knowledge of the conductor, and is not directed or requested to leave, but pays the usual fare of a first-class passenger to such conductor, and is injured on his passage by the negligence or carelessness of the railroad corporation. Is he entitled to compensation for such injury? If inert matter be injured or destroyed by the negligence or carelessness of a common carrier, its owner can maintain an action and recover damages as a recompense for such injury. Is the traveller entitled to the protection of the law when the negligence of the carrier destroys his goods, and without its protection when the same negligence injures his health or breaks his limbs? If any extraordinary danger arises from the violation of the known rules of the company, — as, by standing on the cars when in motion, — the passenger violating the rules assumes the special risks resulting from such violation. But if the act of the passenger in no way conduces to the injury received, the carrier must be held responsible for the necessary consequences of his negligence or want of care.¹

In *Zemp v. Wilmington, etc. Railroad Company*,² there were two cars on the train, and the plaintiff's seat was in the forward car. Near the door on the inward car was a notice that passengers should not stand on the platform. The train was running over an unfinished part of the road. The cross-ties were too far apart, and were insufficiently spiked, and the accident arose from "the breaking of the cleat at the end of one of the rails." All the other passengers were inside the cars, and none of them were injured.

The defence was that the injury arose from the plaintiff's own fault, in standing upon the platform while the cars were in motion. The verdict was for the plaintiff, which the court refused to set aside, holding that whether the plaintiff had no notice that the platform was a prohibited place, and if so, then whether under the circumstances his own act so contributed to the injury as to exonerate the railroad, who were

¹ *Baker v. Portland*, 53 Me. 199.

² 9 Rich. L. 84.

Supreme Judicial Court of Maine.

guilty of negligence, were for the jury. The plaintiff's seat, "it will be recollected," observes O'NEALL, J., "was in the forward car; the notice proved was in the rear car, on the platform on which he was standing when the accident occurred. That such notice is not enough to change the liability of the company to a passenger is, I think, clear from *Story on Bailment*, sect. 558. If the conductor had said to the plaintiff, as was his duty, 'you are in an improper place,' and he had then persisted in remaining, it might have been that this would have excused the company from any consequences which might have followed." An action was brought against a railroad company by a passenger, while travelling in one of its gravel-trains. The defendant asked the court to instruct the jury that a railroad company was not liable for an injury which might happen to one taking passage in a gravel-train, and not engaged in carrying passengers. This requested instruction was held to be properly denied in *Lawrenceburgh and Upper Mississippi Railroad Company v. Montgomery*,¹ the court holding that in a suit brought against a railroad for an injury occasioned by a collision, it was not sufficient for the company to show that the plaintiff was acting at the time in disobedience of a proper order to secure his safety, but that it should also appear that the injury was occasioned by such disobedience. In *Watson v. Northern Railway Company*,² the plaintiff, travelling in the defendant's train on a passenger-ticket, went into the express company's compartment of a car. While there, owing to the negligence of the defendant's servants, the train, which was stationary, was run into by another coming up behind it, and the plaintiff's arm was broken. No person in the passenger-cars was seriously injured. It was proved that notice that the passengers were not allowed to ride in the baggage-car was usually posted upon the inside of the door of the passenger-cars, but it was not distinctly shown that it was there on that day. The jury found that the plaintiff was wrongfully in the car, but that he was not told where to go when he bought his ticket, nor did the conductor order him out, and so he was not to blame. "In my opinion," observes DRAPER, C. J., "the jury were warranted in finding that the plaintiff did not so contribute (to the injury) as to deprive him of the right to recover. Giving the fullest weight to the considerations urged in the defence, such as the ticket which the plaintiff had, the notices stated to have been kept up in the cars, conceding the plaintiff saw them, though it is not proved, I do not think they preclude the plaintiff from recovering, when the injury he sustained was occasioned by collision resulting entirely and directly

¹ 7 Ind. 475.² 24 Upper Canada Q. B. 93.

Dunn v. Grand Trunk Railway.

from the gross negligence of the defendants' servants." In *O'Donnell v. Allegheny Valley Railroad Company*,¹ in a suit by an employee of a railroad company, who held the relation of a passenger, the court charged that the baggage-car is an improper place for a passenger to ride; whether the rule against it was communicated to him or not, if he left his seat in a passenger-car and went into the baggage-car, it was negligence which nothing less than a direction or an invitation of the conductor could excuse; and such invitation should not be inferred from his having ridden there frequently with the knowledge of the conductor, without his objection. *Held*, to be error.

That a railroad corporation cannot repudiate the acts of its agents so as to free themselves from responsibility for their negligence, was held in *Lackawanna and Bloomsburgh Railroad Company v. Chenewith*,² where the agents of a railroad company, contrary to the instructions and rules of the company, at the request of the owner of a freight-car, attached it to a passenger-car, the plaintiff agreeing to run all risks; the plaintiff having sustained a loss by the negligence of the defendant, brought his action for compensation. The same defence was attempted as in the case at bar. The plaintiff was not a trespasser, "for," observes THOMPSON, J., "he was there by permission, and under the contract of parties competent to give him authority to be there. * * * When, therefore, they (the defendants) consented to hitch on his (plaintiff's) car to the passenger-train, even at his urgent solicitation, — and we have not a particle of evidence that other inducements to do the act were held out, excepting freedom from responsibility as a consequence of the attachment, — we must presume it was done with a view to the compensation to be paid on the one hand, and the usual care to be exercised on the other. The argument, however, is that the plaintiff was guilty of such a wrong in asking permission for his car to be attached, that, whether the act contributed to the disaster or not, he is to be treated as a trespasser, and not entitled to any compensation for injuries not wilfully done. We think this is not the law, unless in a case when the will of an agent is controlled and subverted by improper influences, he is induced to do that which is manifestly beyond the scope of his powers. That there was a regulation against running freight-trains with passenger-cars may be admitted, although it was not properly proved, yet that neither proved that it might not be safely done, nor that if the company undertook to do it they might lay aside the duty of care and commit such cases to the guardianship of chance."

When a railroad company admits passengers into a caboose-car

¹ 59 Pa. St. 239.

² 52 Pa. St. 383.

 Supreme Judicial Court of Maine.

attached to a freight-train, to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger-coaches at the time of the occurrence of the injury.¹ In *Carroll v. New York and New Haven Railroad Company*,² the plaintiff, remarks BOWORTH, J., "took a seat in the post-office apartment of the baggage-car. The position was injudiciously chosen, and may be assumed to have been known to him to have been a far more dangerous one than a seat in a passenger-car. He took it with the assent of the conductor. He was not there as a trespasser, or wrongfully as between him and the defendants. So far as all questions involved in the decision of this action are concerned, he was lawfully there." His being there was not such negligence as would exonerate the defendants from the consequences of their negligence or want of care.

The plaintiff was not entitled by law to be carried on the freight-train contrary to the regulations of the defendant company. They might have refused to carry him, and have used force to remove him from the train. Not doing this, nor even requesting him to leave, but suffering him to remain and receiving from him the ordinary fare, they must be held justly responsible for negligence or want of care in his transportation.

The question before the court was whether the defendants were liable at all as common carriers. The defence was based entirely upon a regulation of the company. There was no question raised as to the general obligations of carriers. Indeed, none is raised at the argument. The counsel for defendants rest their defence on the rules of the company. The plaintiff had paid the usual fare of a first-class passenger. The defendants had received it, and had undertaken the transportation of the plaintiff in their freight-train, during the course of which he was injured by their neglect or want of care. Under such circumstances, the judge said that they could not "plead their regulation in release of their ordinary liabilities, but they were just as liable as if it had been a passenger-train, and as if there had been no notice, provided plaintiff was not guilty of any fault or want of ordinary care himself."

Undoubtedly a passenger taking a freight-train takes it with the increased risks and diminution of comfort incident thereto; and if it is managed with the care requisite for such trains, it is all those who embark in it have a right to demand.³ "We have said in *Chicago and Galena Railroad Company v. Fay*,"⁴ observes BREESE, J., "that

¹ *Edgerton v. New York etc. R. Co.*, 39 N. Y. 227.

² 1 Duer, 578.

³ *Chicago etc. R. Co. v. Hazzard*, 26 Ill. 373.

⁴ 16 Ill. 563.

Dunn v. Grand Trunk Railway.

a passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adapt the proper care, vigilance, and skill to that particular means; for this, and this only, was the defendant responsible. The passengers can only expect such security as the mode of conveyance affords."

If there was any peculiar risk incident to transportation on a freight-train, the counsel should have called the attention of the court to such special difference, whatever it may be. But "the responsibility of a railroad company for the safety of its passengers does not depend on the kind of cars in which they are carried, or on the fact of payment of fare by the passenger."¹ "The evidence," says WALKER, J., in that case, "shows that the road had been carrying passengers on their construction-trains, and they must be held to the same degree of diligence with that character of train as with their regular passenger-coaches, for the safety of the persons and lives of their passengers."

If the defendants claimed that they might exercise a diminished degree of caution arising from the character of the train, they should have requested a corresponding instruction.

The cases to which our attention has been called, so far as we have been enabled to examine them, are inapplicable. In *Lygo v. Newbold*,² the plaintiff contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant with his cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her. On the way, the cart broke and the plaintiff was thrown out and injured. *Held*, that as the defendant had not contracted to carry plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained. But in that case it does not appear that the defendant was a common carrier, that he undertook to carry, or received or was to receive any compensation for the carriage of the plaintiff. In *Lucas v. New Bedford and Taunton Railroad Company*,³ it was held that a person who enters the cars of a railroad corporation, not as a passenger, but for the purpose of assisting an aged and infirm relative to take a seat as a passenger, must, in order to maintain an action against the corporation for an injury sustained while leaving the cars, show that he exercised due care; that the corporation was wanting in ordinary care, and that such negligence was the cause of the injury; and if he attempts to leave the cars after they have started, or, finding them

¹ Ohio etc. R. Co. v. Muhling, 30 Ill. 9.

² 9 Exch. 302.

³ 6 Gray, 65.

 Whether Reasonableness of Regulation a Question of Law or Fact.

in motion as he is going out, persists in making progress to get out, he cannot maintain such action if his attempt causes or contributes to the injury, even if the corporation give him no special notice of the time of departure of the cars, and are guilty of negligence in starting the cars, and in a jerk occurring after the first start, which negligence also contributes to the injury. But in that case the plaintiff was not a passenger; he was not there for the purpose of being transported. The servants of the corporation could not know, and were not obliged to know, the purpose for which he came aboard. Besides, the plaintiff must show due care. The implication from the case is, that with due care on the part of the plaintiff, and negligence on that of the corporation, the action was maintainable, and is adverse to the defendants.

Exceptions overruled.

KENT, DICKERSON, BARROWS, and TAPLEY, JJ., concurred.

NOTES.

§ 1. **Power of Carriers to establish Regulations.**—The general rule is that carriers may establish reasonable regulations for the conduct of their business. The validity of every regulation depends upon its reasonableness; and by some courts this is held to be a question of fact,¹ by others a mixed question of law and fact,² and by others a question of law.³ Thus, it is said: "The reasonableness of a rule or regulation is a mixed question of law and fact, to be found by the jury on trial, under the instructions of the court. It may depend on a great variety of circumstances, and may not improperly be said to be in itself a fact to be deduced from other facts. It is not to be inferred from the rule or regulation itself, but must be shown positively."⁴ "There are strong reasons why the reasonableness of railroad regulations should, in the absence of any positive proof as to their effect, be submitted to the court as a question of law, rather than to the jury as one of fact. Ordinarily, jurors are not aware, nor can they readily be made aware, of all the reasons calling for the rule. They are apt to listen readily to any allegations of injuries on railways. What one jury might deem an inconvenient rule, another might approve as judicious and proper. There would be no uniformity."⁵ There is great force in this last utterance; but the current of authority seems to be that the question is a mixed one of law and fact.⁶ The most important of these regulations will now be discussed in detail.

¹ *The State v. Overton*, 24 N. J. L. 435.

² *Day v. Owen*, *ante*, p. 306; *Jencks v. Coleman*, *ante*, p. 11; *Du Laurans v. St. Paul etc. R. Co.*, 15 Minn. 49; *Bass v. Chicago etc. R. Co.*, *ante*, p. 311.

³ *Hibbard v. New York etc. R. Co.*, 15

N. Y. 455, 459; *Vedder v. Fellows*, 20 N. Y. 126.

⁴ *Per Manning, J.*, *Day v. Owen*, 5 Mich. 520, 527; *ante*, p. 306.

⁵ *Per Strong, J.*, *Vedder v. Fellows*, 20 N. Y. 126, 131.

⁶ 1 Redf. on Rys. 95.

Notes.

§ 2. Regulations as to Exhibition and Delivery of Tickets. — The carrier has the right to make reasonable regulations requiring passengers to exhibit and deliver up their tickets to his agent or servant. The circumstances of the case make such a rule imperatively necessary. The number of persons carried, for example, in railway coaches, the great variety of tickets used, the frequency of stations upon the line, the fact that passengers go over many connecting lines upon a single journey and that each line must have a certain portion of the ticket in order to demand compensation from the office which issued the ticket, — all these circumstances concur to demonstrate that any serious restriction laid upon the carrier's power in this respect would result in frequent loss, or needlessly enhance the difficulty of obtaining compensation for carriage. The passenger who refuses to comply with such a regulation forfeits his right to further carriage, and may be ejected from the train by the servants of the railway company, of course without unnecessary violence.¹

Regulations of this kind ought not to be condemned unless they are palpably unjust.² It is not unreasonable to demand of the passenger the surrender of his ticket in exchange for a conductor's check.³ But a passenger ought not to be compelled to give up his ticket without such a check in return, at a considerable distance from his destination, when there are intervening stations at which the train stops.⁴ A passenger has no right, however, to demand a conductor's check in exchange for his ticket after the train has left the station immediately preceding that to which his ticket entitles him to be carried.⁵ Persons holding commutation or season tickets may be required to exhibit them whenever requested, and on refusal to do so may be compelled to pay the regular fare as transient passengers, without liability on the part of the company to repay the same.⁶ And on refusal to pay the regular fare, the commuter may be ejected from the train at the next station.⁷ But if the conductor of the train knows that a person unable to produce his ticket is a commuter, and that his ticket has not expired, he must act reasonably under the circumstances. If the passenger assures him that he has the ticket, but has mislaid it, he must be allowed to ride as long as there is any reasonable expectation of finding it. Although such passenger had signed a receipt by which he agreed to show his ticket to the conductor in the same manner as other passengers, when required, yet, in the absence of an express stipulation in the contract that the plaintiff should pay his fare unless the ticket should be produced, his failure to produce the ticket was not such a breach of the contract as to justify the defendants in rescinding it, and treating the plaintiff as a trespasser on the train.⁸

¹ *The People v. Caryl*, 3 Park. Cr. Cas. 326; *Baltimore etc. R. Co. v. Blocher*, 27 Md. 277; *Loring v. Aborn*, 4 Cush. 603; *The State v. Campbell*, 32 N. J. L. 309; *Hibbard v. New York etc. R. Co.*, 15 N. Y. 455. But if the conductor knows that the passenger has paid his fare, he has no right to expel him from the car although he refuses to exhibit his ticket. *Ibid.*, per Comstock, J.

² *Vedder v. Fellows*, 20 N. Y. 126.

³ *Northern R. Co. v. Page*, 22 Barb. 130.

⁴ *The State v. Thompson*, 20 N. H. 251;

Pittsburgh etc. R. Co. v. Hennigh, 39 Ind. 509.

⁵ *Illinois etc. R. Co. v. Whitmore*, 43 Ill. 420.

⁶ *Bennett v. Railroad Co.*, 7 Phila. 11; *Ripley v. New Jersey etc. Transp. Co.*, 31 N. J. L. 388; *Woodard v. Eastern Counties R. Co.*, 30 L. J. (M. C.) 196.

⁷ *Downs v. New York etc. R. Co.*, 36 Conn. 287.

⁸ *Maples v. New York etc. R. Co.*, 33 Conn. 557.

 Forfeiture under English Statute.

In England it is provided by statute,¹ that, "If any person travel, or attempt to travel, in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof; or if any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof; or if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings." By the same statute it is provided:² "For better enforcing the observance of all or any of such regulations, it shall be lawful for the company, subject, etc., to make by-laws, * * * provided that such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special act, * * * and any person offending against any such by-laws shall forfeit for every such offence any sum not exceeding £5, to be imposed by the company in such by-laws as a penalty for any such offence." * * * Under § 103 of the foregoing provisions it is held that fraudulent intention is the gist of the offence of travelling without having paid the fare,³ and the fact that a person rode beyond the station for which he had purchased a ticket, but on getting out of the train tendered the full local fare charged by the company for this extra distance, after delivering up his ticket, was no evidence of an intention to defraud the company.⁴

Under § 103, by-laws are frequently made requiring a passenger not producing or delivering up his ticket to pay his fare from the place from which the train originally started, or in default thereof forfeit a sum not exceeding forty shillings. In *Chilton v. London, etc. Railway Company*,⁵ a by-law of this description, made under the provisions of an act incorporating the railway company, similar in effect to the provisions above set out from the Companies Clauses Consolidation Act, was held not to impose a *penalty*, and therefore justify the arrest and imprisonment of a passenger committing a breach of it, in accordance with other provisions for the enforcement of penalties in the act incorporating the company.⁶ But the contrary has been intimated in a late case.⁷ In *London, etc. Railway Company v. Watson*,⁸ the express ground of the decision of the Court of Appeal was that such a by-law did impose a penalty, recoverable only before justices, according to the provisions of the act,⁹ and not as a debt in a court of civil jurisdiction.

§ 3. *Passenger riding without Ticket, or without a Proper Ticket.*—As between the conductor and the passenger, the ticket purchased by the latter of the proper officer of the carrier is the only evidence of the right of the

¹ Companies Clauses Consolidation Act, 8 Vict., c. 20, § 103.

² *Ibid.*, § 109.

³ *Dearden v. Townsend*, L. R. 1 Q. B. 10; *Bentham v. Hoyle*, 3 Q. B. Div. 289; *London etc. R. Co. v. Watson*, 3 C. P. Div. 429; s. c. 4 C. P. Div. 118. See also *Regina v. Frere*, 4 El. & Bl. 598; *McCarthy v. Dublin etc. R. Co.*, Irish Rep. 3 C. L. 511.

⁴ *Dearden v. Townsend*, *supra*.

⁵ 16 Mee. & W. 212.

⁶ See also *Barr v. Midland R. Co.*, Irish Rep. 1 C. L. 130.

⁷ *Brown v. Great Eastern R. Co.*, 2 Q. B. Div. 406.

⁸ 4 C. P. Div. 118; s. c. 3 C. P. Div. 429.

⁹ § 145.

Notes.

passenger to travel. The conductor cannot be expected to accept explanations of the passenger in regard to an improper ticket which he produces, or when he fails to produce any ticket whatever.¹ A passenger who has mislaid his ticket is entitled to a reasonable length of time in which to search for it. He is not obliged to have his ticket ready in hand the moment the conductor may demand that it shall be exhibited.² The loss of a ticket is very properly held to fall upon the passenger. Any other rule would be a source of endless fraud upon the carrier and intolerable delay to the public. "It is better and more reasonable that a passenger should now and then have to suffer the consequences of his own want of care, than that a system should be rendered impracticable which seems necessary to the transaction of this important branch of business.

* * * The public, whether wisely or not, desire to travel at the rate of four or five hundred miles a day, and that rapidity of movement cannot be accomplished without peculiar arrangements to suit the exigency, which must sometimes be found to produce inconvenience."³ It is the duty of the passenger, in case he has lost or mislaid his ticket, or the ticket which he happens to hold does not entitle him to proceed further, although he may have paid the price of a ticket to a station further on, to pay the fare demanded, and if the company afterwards refuses to make suitable reparation for the indignity to which he has been exposed in being compelled to repay his fare, he can maintain his action against it.⁴ But the circumstances may be such that satisfactory evidence can be given to account for the failure to produce the customary ticket, in which case the conductor is not justified in following out his instructions literally and in disregard of such evidence; as, where the plaintiff purchased a ticket for a berth in a sleeping-car, which he exhibited to the porter, who showed him his berth, which the plaintiff made preparations to occupy, and afterwards the ticket was demanded by the conductor of the car. The ticket could not be found, having been lost in the meantime by the passenger. The train had not yet left the station where the ticket was purchased, and the plaintiff procured from the defendant's agent a writing certifying that he had paid for the berth he was occupying. The conductor refused to accept this or any explanations in lieu of the ticket, and he was accordingly ejected from the sleeping-car. It was held that he was entitled to recover the price paid for his ticket, and reasonable compensation for the trouble and inconvenience occasioned by being deprived of his berth in the sleeping-car.⁵

The fact that one of the defendant's conductors has wrongfully taken a pas-

¹ *Townsend v. New York etc. R. Co.*, 56 N. Y. 295 (but see *s. c.* 4 Hun, 217; 6 Thomp. & C. 495); *Frederick v. Marquette etc. R. Co.*, 37 Mich. 342; *s. c.* 6 Reporter, 116; *Shelton v. Lake Shore etc. R. Co.*, 29 Ohio St. 214; *Pullman Palace-Car Co. v. Reed*, 75 Ill. 125; *Weaver v. Rome etc. R. Co.*, 3 Thomp. & C. 270; *Jerome v. Smith*, 48 Vt. 230; *Downs v. New Haven etc. R. Co.*, 36 Conn. 287; *Chicago etc. R. Co. v. Griffin*, 68 Ill. 499. But see *Hamilton v. Third Avenue R. Co.*, 53 N. Y. 25.

² *Curtis v. Grand Trunk R. Co.*, 12 Upper Canada C. P. 89; *Maples v. New York etc. R. Co.*, 38 Conn. 557.

³ *Robinson, C. J.*, in *Duke v. Great Western R. Co.*, 14 Upper Canada Q. B. 377, 384; *s. c. id.* 369.

⁴ *Chicago etc. R. Co. v. Griffin*, and *Frederick v. Marquette etc. R. Co.*, *supra*.

⁵ *Pullman Palace-Car Co. v. Reed*, 75 Ill. 125. An informal writing by the ticket-agent to the effect that a passenger has paid his fare, becomes a ticket as good as the printed one usually sold. *St. Louis etc. R. Co. v. Dalby*, 19 Ill. 353, 365, per Caton, C. J. See also *Toledo etc. R. Co. v. McDonough*, 53 Ind. 289.

 Passenger riding without Proper Ticket.

senger's ticket from him does not justify him in getting upon another train of the defendant's, with the intention of riding without paying his fare. The conductor may properly expel such a passenger from his train.¹ Likewise, a passenger may be compelled to pay his fare who has in his possession a coupon ticket which entitles him to ride the distances indicated by the coupons respectively, but who has lost a conductor's check which had been given him in exchange for one of his coupons. In such a case, the ticket with the coupons remaining attached, entitling him to ride from some point further on to his destination, is no evidence to the conductor of his right to ride upon that section of the road covered by the coupon detached by the conductor previously having charge of the train.² If the passenger has paid for three tickets for himself and companions, and received only two, the production of these two, with an explanation as to the failure to procure the third, cannot excuse the payment of fare demanded.³ A railroad company is under no obligation to carry persons for less than the usual rates. If it chooses to do so, the passenger must comply with the regulations made in such cases, — viz., show a permission from the proper officer to travel. If this is not done, a person so travelling may be ejected from the train.⁴

A lunatic, unknown to the servants of the carrier as such, and carelessly left in his seat alone by the person having him and his ticket in charge, may be rightfully expelled from the train, although he does not understand the demand made upon him for the payment of his fare.⁵

¹ *Shelton v. Lake Shore etc. R. Co.*, 29 Ohio St. 214; *Townsend v. New York etc. R. Co.*, 56 N. Y. 295. If a passenger has received a conductor's check in exchange for his ticket, and gets upon another train by the direction of the company's servant, and on the assurance of the conductor that such check will be received upon the other train, the company will be responsible for the act of the conductor in refusing to recognize such check and expelling the passenger from the train. *Toledo etc. R. Co. v. McDonough*, 53 Ind. 289.

² *Jerome v. Smith*, 48 Vt. 230. See also *O'Brien v. Boston etc. R. Co.*, *ante*, p. 22. If there is no special contract to vary the terms of a railroad ticket, it must be used as those terms direct, — e.g., a ticket with the words "Portland to Boston" imprinted on it, purchased in Portland, does not entitle the holder to a passage in a direction the reverse of that indicated on the ticket. *Keeley v. Boston etc. R. Co.*, 67 Me. 163; *s. c.* 6 Cent. L. J. 382; 17 Alb. L. J. 366; *Coleman v. New York etc. R. Co.*, 106 Mass. 160. Where an additional and more circuitous route exists between two points on the main line of a railroad, a passenger holding a through ticket cannot, as a matter of right, leave the train on the main line at one of these points and demand transportation to

the other point over the circuitous route without paying additional fare. The company is bound only to carry the passenger over the through and most direct route. Especially is this so, when the rate per mile to be charged for tickets is fixed by statute, and the price of the ticket, as in this case, was for the number of miles travel on the most direct line between the two points. *Bennett v. New York etc. R. Co.*, 69 N. Y. 594; *s. c.* 5 Hun, 599. See also *Adwin v. New York etc. R. Co.*, 60 Barb. 590.

³ *Weaver v. Rome etc. R. Co.*, 3 Thomp. & C. 470.

⁴ *Goetz v. Hannibal etc. R. Co.*, 50 Mo. 472.

⁵ *Willets v. Buffalo etc. R. Co.*, 14 Barb. 585. In *Jennings v. Great Northern R. Co.*, L. R. 1 Q. B. 7, the plaintiff took tickets for himself, his servants, and horses by a particular train on the defendants' railway. The train was afterwards divided into two. The plaintiff travelled in the first part of the train, taking all the tickets with him. When the second train, with the servants and horses, was about to start, the plaintiff's servants were required to produce their tickets, and on their being unable to do so, the defendants refused to carry them. A by-law of the defendants provided that "No passenger will be allowed to enter any carriage without having first paid his fare and

Notes.

§ 4. *Refusal to pay Fare.*—A wilful refusal to pay the proper fare demanded justifies expulsion from the train. The railroad company is under no obligation to transport a trespasser, and he may be expelled at any time, provided the manner and place of expulsion are such that the act will not result in wanton injury.¹ It is important to observe the distinction between passengers who may honestly differ with the company's agents in regard to their rights, and therefore refuse to submit to exactions of fare in addition to that already paid, and persons who board the train, or remain upon it after their ticket is exhausted, with the intention of defrauding the company or resisting demands for payment of fare. It would seem that trespassers are not "passengers" contemplated by statutes which forbid the expulsion of passengers at other than regular stations.² But this distinction is not always observed.³

After a person has refused to pay his fare, and is being put off the train, he acquires no right to passage by then tendering the fare demanded.⁴ In such a case, if put off at a regular station, he must there obtain a ticket and tender his fare.⁵

Where the rates of fare fixed by the company were higher than allowed by law, and the plaintiff entered the cars and tendered the legal fare for the purpose, as he afterwards declared, of making money by suit against the company for expulsion in consequence of refusal to pay the rate fixed by the company, having been so expelled, it was held that he was entitled only to compensatory

obtained a ticket. Each passenger, on payment of his fare, will be furnished with a ticket, which such passenger is to show when required, and to deliver up before leaving the company's premises, upon demand." It was held, in an action by the plaintiff for not carrying his servants, that as the defendants contracted with the plaintiff, and delivered the tickets to him, and not to the servants, they were not in a position to enforce the by-law.

¹ *Great Western R. Co. v. Miller*, 19 Mich. 305; *Haley v. Chicago etc. R. Co.*, 21 Iowa, 15; *Chicago etc. R. Co. v. Boger*, 1 Bradw. 473; *Lillis v. St. Louis etc. R. Co.*, 64 Mo. 464; *Ohio etc. R. Co. v. Muhling*, 30 Ill. 9; *O'Brien v. Boston etc. R. Co.*, 15 Gray, 20; *s. c. ante*, p. 22.

² *Lillis v. St. Louis etc. R. Co.*, and *Chicago etc. R. Co. v. Boger*, *supra*; *The People v. Jillson*, 3 Park. Cr. Cas. 234.

³ *Chicago etc. R. Co. v. Peacock*, 48 Ill. 253; *Fulton v. Grand Trunk R. Co.*, 17 Upper Canada Q. B. 423.

⁴ *The People v. Jillson*, 3 Park. Cr. Cas. 234; *O'Brien v. Boston etc. R. Co.*, *ante*, p. 22; *The State v. Campbell*, 32 N. J. L. 309; *Nelson v. Long Island etc. R. Co.*, 7 Hun, 140; *Stone v. Chicago etc. R. Co.*, 47 Iowa, 82; *s. c.* 10 Ch. Leg. N. 73; 6 Reporter, 489; *Hoffbauer v. D. & N. R. Co.*, 20 Alb. L. J. 474; *Fulton v. Grand Trunk R. Co.*, 17 Upper

Canada Q. B. 423; *Hibbard v. New York etc. R. Co.*, 15 N. Y. 455, 462, per Denio, C. J.

⁵ *Nelson v. Long Island R. Co.*, *supra*. In *The State v. Campbell*, *supra*, the passenger had in his possession a spent ticket and a regular ticket. He insisted on the right of passage on the spent ticket, and exhibited no other. Having been ejected from the train after considerable delay and difficulty, he produced the regular ticket, and demanded that he be carried upon it, which demand was refused. The court held that his tortious refusal to produce this ticket before his expulsion was a breach of the contract, saying: "A passenger takes his ticket subject to the reasonable regulations of the company; it is an implied condition in his contract that he will submit to such regulations; and if he wilfully refuses to be bound by them, by so doing he repudiates his contract, and after such repudiation cannot claim any right under it." It was resolved in *Stone v. Chicago etc. R. Co.*, *supra*, that where a passenger has been ejected from a train for non-payment of fare, he must pay the fare from the station where he first entered the train, before he can insist on being carried forward upon the same train; and if he purchase a ticket at the point where he was ejected, the conductor may nevertheless exclude him from the train.

Discrimination in Price of Tickets.

damages, and for the purpose of mitigating the damages his subsequent declarations as to his object in entering the train were admissible in evidence.¹ When upon a steamboat no collection of fares is made until the landing is reached, a person attempting to leave the boat without producing a ticket may be detained a reasonable length of time, in order that the officers of the boat may investigate statements explanatory of his failure to produce the ticket.²

§ 5. **Discrimination in Price of Tickets purchased at the Company's Office and Fare paid on the Train.**—In some cases, the right of the railroad company to charge an extra price for carriage of those passengers who pay their fare upon the train is guaranteed by statute.³ In general, it is held that a regulation of this kind, in the absence of any statute controlling the matter, is reasonable.⁴ The Supreme Court of Maine, speaking of such a regulation, say: "It is important to promote and secure safety by allowing time to the conductor to attend to his proper duties on the train, and which would be often seriously interfered with if his time was taken up in collecting fares, exchanging money, and answering questions. It is highly important as a check against mistakes or fraud on the part of the conductors, and as a guard against imposition by those seeking a passage from one station to another without payment."⁵

But if a railroad company chooses to make a regulation of this character, a corresponding duty would seem to devolve upon it of providing those seeking passage with all the conveniences necessary for the purchase of tickets.⁶ "To justify this discrimination, every reasonable and proper facility must be afforded the passenger to procure his ticket. They must furnish a convenient and accessible place for the sale of the tickets, with a competent person in attendance ready to sell them, which should be open and accessible to all passengers for a reasonable time before the departure of each train and up to the time of its actual departure, so that it shall really be a case of neglect, and not of necessity, on the part of the passenger, and not the fault of the company. If a company will keep its ticket-office closed till a crowd of clamorous passengers have gathered around, so as to make it dangerous or inconvenient for females or infirm persons to get tickets, surely the fault is not theirs, but the company's, if they do not procure the tickets; and, under such circumstances, to charge them more than the price established for tickets would be but an imposition and an outrage which the law cannot sanction."⁷ In a later case, this same court

¹ Cincinnati etc. R. Co. v. Cole, 29 Ohio St. 126.

² Standish v. Narragansett Steamboat Co., 111 Mass. 512.

³ Laws N. Y. 1857, p. 488, chap. 228; Code Ala. 1876, § 1698; Laws Iowa 1874, p. 61, § 2; Rev. N. J. 1877, p. 944, § 164; Nellis v. New York etc. R. Co., 30 N. Y. 505.

⁴ Chicago etc. R. Co. v. Parks, *ante*, p. 319; St. Louis etc. R. Co. v. Dalby, 19 Ill. 353; Stephen v. Smith, 29 Vt. 160; St. Louis etc. R. Co. v. South, 43 Ill. 176; Crocker v. New London etc. R. Co., 24 Conn. 249; Porter v. New York etc. R. Co., 34 Barb. 353; Bordeaux v. Erie R. Co., 8 Hun, 579; The State v. Chovin, 7 Iowa, 204; Du Laurans v. St. Paul

etc.-R. Co., 15 Minn. 49; Indianapolis etc. R. Co. v. Rinard, 46 Ind. 293; Jeffersonville etc. R. Co. v. Rogers, 38 Ind. 116; s. c. 28 Ind. 1; Hilliard v. Goold, 34 N. H. 230; The People v. Jillson, 3 Park. Cr. Cas. 234.

⁵ The State v. Goold, 53 Me. 279, 281.

⁶ Chicago etc. R. Co. v. Parks, *ante*, p. 319; St. Louis etc. R. Co. v. Dalby, 19 Ill. 352; Chicago etc. R. Co. v. Flagg, 43 Ill. 364; Du Laurans v. St. Paul etc. R. Co., 15 Minn. 49; Jeffersonville etc. R. Co. v. Rogers, 38 Ind. 116; s. c. 28 Ind. 1; Indianapolis etc. R. Co. v. Rinard, 46 Ind. 293.

⁷ Per Caton, J., in Chicago etc. R. Co. v. Parks, 18 Ill. 460, 465; s. c. *ante*, p. 319.

Notes.

saw fit to explain its former opinion in one particular, namely, that the court, in speaking of the time of the actual departure of a train, up to which the ticket-office must be kept open, must be understood as referring to the published fixed time which everybody knew. If a person saw fit to apply at the ticket-office after the published time for the departure of a train, he could not demand the same rights and privileges as those who came at the proper time for their tickets. Any other rule would oblige the railroad company, in case its trains were delayed, to keep a person stationed in its office until the train delayed might arrive.¹

Elsewhere it is held that as a railroad company is under no obligation to establish offices for the sale of its tickets,² and as a company may establish one rate of fare when paid upon its trains and another when paid at its offices, it follows that when the office of the company is closed, the rate upon the train is the only one in existence.³

It is provided by statute in New York, that "any railroad company which shall ask and receive a greater rate of fare than that allowed by law shall forfeit \$50, which sum may be recovered, together with the excess so received, by the party paying the same," etc.⁴ By a statute passed the same year, it is provided that the New York Central Railroad Company, "at every station on its road where a ticket-office is now or may hereafter be established, shall keep the same open for the sale of tickets at least one hour prior to the departure of each passenger-train from such station."⁵ The right to charge persons paying their fare upon the train five cents extra is also guaranteed by this statute.⁶ In a case arising under these provisions, the facts were that the plaintiff was in the neighborhood of the ticket-office and had ample opportunity to procure his ticket before the arrival of the train. He waited, however, until he heard the whistle of the engine of the approaching train, and then went to the office to procure his ticket. The ticket-agent was absent, but came in from the train, without the key to the ticket-drawer, which had been taken off by a person in charge of the office on the approach of the train. The train was behind time, but the office had been kept open up to the published time of the departure of the train. The passenger having been compelled to pay the five cents extra, the usual fare, brought an action for the statutory penalty. The court held that the company was required to keep its ticket-office open until the *actual* departure of the train; and if they closed it prior to that time, passengers afterwards applying for tickets could not be charged the additional fare; furthermore, that if the company have nobody at the office to furnish a ticket, it is not open within the meaning of the statute.⁷

¹ St. Louis etc. R. Co. v. South, 43 Ill. 176. But see Porter v. New York etc. R. Co., 34 Barb. 353.

² Nellis v. New York etc. R. Co., 30 N. Y. 505.

³ Crocker v. New London etc. R. Co., 34 Conn. 249. But it is gratifying to observe that this decision was by a divided court, and has not been generally assented to. DuLauraus v. St. Paul etc. R. Co., 15 Minn. 49. It has, however, received sanction in a late case of the Supreme Court of New York. Bordeaux v. Erie R. Co., 8 Hun, 579. But *contra* is the language of the Court of Ap-

peals in an earlier case: "To compel a passenger to pay a penalty because the company had deprived him of the power to travel for the regular fare, would be so oppressive and unjust that it would require a positive provision of a legislative act to induce any tribunal to sanction it." Nellis v. New York etc. R. Co., 30 N. Y. 505, 516. See also Illinois etc. R. Co. v. Sutton, 42 Ill. 438.

⁴ Laws N. Y. 1857, p. 432, chap. 135.

⁵ *Id.* 488, chap. 228, § 1.

⁶ *Id.* § 2.

⁷ Porter v. New York etc. R. Co., 34 Barb. 353.

 Transportation upon Freight-trains.

By the same statute it is provided that the New York Central Railroad Company shall not be required to keep their ticket-offices open, except at Utica and six other places, between the hours of nine o'clock P. M. and five o'clock A. M. A passenger applied at the Utica office at about one o'clock A. M., and found it closed, and thereupon took his seat in the cars. The extra five cents was demanded and paid. In an action for this excess and the statutory penalty, the court held that the extra fare could only be demanded when the passenger failed to purchase his ticket at an established office which was open.¹ A person who has properly applied for a ticket, and is unable to procure one from any cause attributable to the company or its agents, is entitled to be carried at the ticket rate. He has the choice of paying the excess demanded of him or of insisting upon his right to be thus carried, and of holding the company responsible in damages for the refusal to carry him.²

§ 6. Transportation of Passengers upon Freight-trains. — (1.) *In general.* — It is the undoubted right of railway companies to appropriate a portion of their trains exclusively to the carrying of freight, and to entirely exclude passengers therefrom. Their obligations to the public only require them to furnish sufficient passenger-trains to accommodate the travel, and such freight-trains as the business of the country along their line requires. They are not required to carry passengers upon their freight-trains, or freight on their passenger-trains. But they may, if they choose, do either.³ When, therefore, a railroad company regularly carries passengers upon its freight-trains, and holds itself out to the public as ready to do so, it thereby becomes a common carrier of passengers by such freight-trains, and the right of a passenger to passage thereon, subject to reasonable regulations, is as assured as upon the regular passenger-trains.⁴

A very common regulation is that passengers, before going on board freight-trains, shall procure their tickets at the company's office, and on failure to do so shall be expelled from the train. The reasonableness of a regulation of this kind is not denied.⁵ But in order that the company may be in a position to enforce such a regulation, it is necessary that proper facilities should be provided for passengers to obtain their tickets, and that the ticket-office of the company be open for a reasonable time previous to the departure of the train.⁶

¹ *Nellis v. New York etc. R. Co.*, 30 N. Y. 505.

² *Jeffersonville etc. R. Co. v. Rogers*, 38 Ind. 116.

³ *Chicago etc. R. Co. v. Randolph*, 53 Ill. 510; *Railway Co. v. Moore*, 49 Texas, 31.

⁴ *Chicago etc. R. Co. v. Flagg*, 43 Ill. 361; *Hazard v. Chicago etc. R. Co.*, 1 Biss. 503; *Mobile etc. R. Co. v. McArthur*, 43 Miss. 180.

⁵ *Chicago etc. R. Co. v. Flagg*, *supra*; *Cleveland etc. R. Co. v. Bartram*, 11 Ohio St. 457; *St. Louis etc. R. Co. v. Myrtle*, 51 Ind. 566; *Lake Shore etc. R. Co. v. Greenwood*, 79 Pa. St. 373; *Evans v. Memphis etc. R. Co.*, 56 Ala. 246; *Kansas etc. R. Co. v. Kessler*, 18 Kan. 523; *Illinois etc. R. Co. v. Johnson*, 67

Ill. 312; *Toledo etc. R. Co. v. Patterson*, 63 Ill. 304; *Illinois etc. R. Co. v. Sutton*, 42 Ill. 438; *Illinois etc. R. Co. v. Nelson*, 59 Ill. 110; *Law v. Illinois etc. R. Co.*, 32 Iowa, 534; *Indianapolis etc. R. Co. v. Rfnard*, 46 Ind. 293. It is also a reasonable regulation that only such passengers shall be permitted to ride upon freight-trains as are provided with tickets of a particular description, — for example: a round-trip ticket, a thousand-mile ticket, or a pass. *Faulkner v. Ohio etc. R. Co.*, 55 Ind. 369.

⁶ *St. Louis etc. R. Co. v. Myrtle*, 51 Ind. 566; *Evans v. Memphis etc. R. Co.*, 56 Ala. 246; *Chicago etc. R. Co. v. Flagg*, 43 Ill. 364; *Illinois etc. R. Co. v. Johnson*, 67 Ill. 312; *Illinois etc. R. Co. v. Sutton*, 42 Ill. 438.

Notes.

If it has been customary to receive passengers upon freight-trains without requiring them previously to procure tickets at the company's office, a person who has travelled upon these trains before the adoption of such a regulation, and indeed afterwards, without objection by the company's servants for want of a ticket, cannot be put off the train without proof of express notice to him of the regulation requiring tickets to be purchased before entering the train. The posting of the new regulation in the station-houses of the company, in such a case, is not notice sufficiently express.¹

If the railroad company, after having carried passengers upon its freight-cars, sees fit to adopt a regulation excluding them altogether, it will be responsible in punitive damages to a passenger who, having purchased a ticket of one of its station-agents, with the assurance that such ticket entitled him to passage upon the company's freight-trains, is afterwards expelled from one of these trains by the conductor in consequence of such regulation.²

(2.) *Who are to be regarded as Passengers.* — When, by the regulations of the company, passengers are forbidden to ride upon freight-trains, and a person nevertheless does so with the knowledge of the conductor of the train, it is sometimes a question as to what are the rights of this person under these circumstances. In *Eaton v. Delaware, etc. Railroad Company*,³ the facts were that the plaintiff was invited by the conductor of a coal-train to ride upon his train to a certain point, with a promise to get him employment as a brakeman. While making this journey, the caboose in which the plaintiff was seated was run into and demolished by a following train, on account of the negligence of the conductor of the coal-train. In an action for injuries received by this accident, it appeared that there was a printed regulation of the defendants for the use of their employees, by which passengers were forbidden to ride upon coal-trains, but of this the plaintiff had no actual knowledge. It did not appear that passengers were habitually or occasionally permitted to ride in the caboose. The court held that, as the conductor of the coal-train acted wholly without authority in the premises, and in violation of express instructions, there was nothing in the foregoing circumstances which would imply the existence of the relation of carrier and passenger between the plaintiff and the defendant; that, as the plaintiff was on the train without authority, he was there unlawfully, and could not recover for the injuries received.

The foregoing decision is strictly in accord with the circumscribed views of the courts of the State of New York in regard to the scope of a servant's authority, and the immunity of the master from liability for the results of acts for the doing of which the servant was not hired.⁴ But as courts in general are not disposed to thus limit the responsibility of the master for the acts of his servant, it will not be surprising to find that a contrary opinion is entertained upon this question. Thus, the Supreme Judicial Court of Maine, in *Dunn v. Grand Trunk Railroad Company*,⁵ have held that a person who enters the "saloon-car" [caboose?] of a freight-train, and after the train has started remains there, without being requested or directed to leave by the conductor,

¹ Lake Shore etc. R. Co. v. Greenwood, 79 Pa. St. 373.

² Kansas Pacific R. Co. v. Kessler, 18 Kan. 523.

³ 57 N. Y. 382.

⁴ Isaacs v. Third Avenue R. Co., 47 N. Y. 122; Parker v. Erie R. Co., 5 Hun, 57.

⁵ 58 Me. 187, ante, p. 328.

Classification of Passengers.

who receives from him the usual fare of a first-class passenger, such person is to be regarded as a passenger, and the corporation incurs the same liability for his safe transportation as if he were in the regular passenger-coaches at the time of the injury, although the regulations of the defendant prohibited the carrying of passengers upon freight-trains. The court said: "The regulations of the defendant corporation are binding on its servants. Passengers are not presumed to know them. Their knowledge must be affirmatively proved. If the servants of the corporation, who are bound to know its regulations, neglect or violate them, the principal should bear the loss or injury arising from such neglect or violation, rather than strangers. The corporation selects and appoints its servants, and it should be responsible for their conduct while in its employ."¹ To the same effect is the decision of the Supreme Court of Pennsylvania in the late case of *Creed v. Pennsylvania Railroad Company*.² These last two cases would seem to express the better view of this question, and they have the support of authority in analogous cases.³

When the evidence shows the existence of a rule excluding passengers from freight-trains, and that the conductor had no authority to relax the rule, and that the person injured while riding upon such a train was acquainted with the regulations of the company in this particular, it is obvious that it cannot be presumed that the company contracted to carry such injured person as a passenger; and no action can be maintained for the injury resulting in his death, caused by the wreck of the freight-train.⁴

§ 7. Classification of Passengers. — (1.) *According to Sex.* — It is a recognized rule that a carrier cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Classifications and discriminations may be made for the general convenience and security of the passengers, but such distinctions must be on some principle or for some reason which the law recognizes as just and equitable, and founded in sound public policy. The reservation of a car for the accommodation of ladies, and gentlemen in company with ladies, is a measure the reasonableness of which has always been conceded.⁵ The company have a right to enforce obedience to such a regulation, and, after notice to a passenger attempting to enter the "ladies' car," may exclude him with force if necessary, but, of course, using no greater amount than adequate to the circumstances of the case.⁶

If there be no sitting room for passengers excluded by the regulation from the

¹ 58 Me. 192.

² 86 Pa. St. 139. See also *Lawrenceburgh etc. R. Co. v. Montgomery*, 7 Ind. 474; *Lucas v. Milwaukee etc. R. Co.*, 33 Wis. 41.

³ *Lackawanna etc. R. Co. v. Chenewith*, 52 Pa. St. 382; *Wilton v. Middlesex R. Co.*, 107 Mass. 108; s. c. 125 Mass. 130; *O'Donnell v. Allegheny R. Co.*, 59 Pa. St. 249; *Washburn v. Nashville etc. R. Co.*, 3 Head, 638; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503; *Pittsburgh etc. R. Co. v. Caldwell*, 74 Pa. St. 421.

⁴ *Houston etc. R. Co. v. Moore*, 49 Texas, 31.

⁵ *Chicago etc. R. Co. v. Williams*, 55 Ill. 185; *Bass v. Chicago etc. R. Co.*, 36 Wis. 450; s. c. 39 Wis. 636; 42 Wis. 654, *ante*, p. 311; *Peck v. New York etc. R. Co.*, 70 N. Y. 587. See also *The State v. Overton*, 24 N. J. L. 435, 441; *Pittsburgh etc. R. Co. v. Hinds*, 53 Pa. St. 572, *ante*, p. 295.

⁶ *Peck v. New York etc. R. Co.*, *supra*; *Bass v. Chicago etc. R. Co.*, *supra*; *McKinley v. Chicago etc. R. Co.*, 44 Iowa, 314.

Notes.

ladies' car, but room to seat them there, they cannot be left standing without a breach of the contract of carriage. But, in such case, it rests in the discretion of the proper officials of the train to select those to be admitted. Passengers aggrieved by the exercise of such discretion, have their remedy in an action for breach of the contract of carriage.¹ A railway company will be responsible for the forcible exclusion of a colored woman from the ladies' car by their servant, although the managing officers of the train have never given any orders to this effect, and the act of the servant in so doing was from mere caprice or wantonness.²

(2.) *According to Color.*—If a classification is to be made upon this basis, it must be founded upon something more substantial than mere prejudice. This regulation must be reasonable, like all other regulations of the carrier.³ In the absence of a statute controlling this matter, it has been held that a rule of a railroad company requiring colored persons to sit at one end of a car, separate from the other passengers, is not an unreasonable regulation.⁴ AGNEW, J., who delivered the opinion of the court in this case, justified this discrimination as ordained by Providence in the nature of things, intermarriage of the races being contrary to natural law, and the races themselves being naturally geographically separated. Moreover, the separation of passengers in this manner "prevents contacts and collisions arising from natural or well-known customary repugnancies, which are likely to breed disturbances by a promiscuous sitting." It is obvious that the latter is the true reason; and the former, without the existence of the latter, would afford no justification whatever for a regulation of this kind. In an earlier case in an inferior court in the same State, it was held that a regulation of a street-car company confining negroes to the front platform exclusively, was reasonable, and justified expelling from the car the plaintiff, a colored man who insisted upon having a seat inside.⁵

In *Hall v. De Cuir*,⁶ the Supreme Court of the United States decided that a statute of Louisiana which prohibited common carriers of passengers from making discriminations on account of color was unconstitutional and void as being a law in restraint of commerce; and that, too, although under the facts of the case at bar the passenger who had been excluded from the cabin occupied by white people was travelling up the river from New Orleans to a point within the State of Louisiana. WAITE, C. J., said: "The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State

¹ *Bass v. Chicago etc. R. Co.*, *supra*. But see *Thorpe v. New York etc. R. Co.*, 13 Hun, 70.

² *Chicago etc. R. Co. v. Williams*, 55 Ill. 185.

³ *Chicago etc. R. Co. v. Williams*, 55 Ill. 185; *Day v. Owen*, 5 Mich. 520, *ante*, p. 306.

⁴ *West Chester etc. R. Co. v. Miles*, 53 Pa. St. 209.

⁵ *Goines v. McCandless*, 4 Phila. 255.

⁶ 95 U. S. 485 (reversing *s. c. sub nom. De Cuir v. Benson*, 27 La. An. 1).

According to Color.

in respect to passengers and property brought from without. On one side of the river, or its tributaries, he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it, Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be."¹

The foregoing opinion was delivered at the October term, 1877. It is to be noticed that the decision of this case was in no manner affected by the Supplemental Civil-Rights Bill of March 1, 1875, as the cause of action accrued prior to that date; therefore this piece of congressional legislation was not discussed in this case.

It is provided by the first section of the act just mentioned,² "that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

The second section provides that any person who shall violate the preceding section shall be liable to a penalty of not less than \$500, and also to an indictment for a misdemeanor: the penalty to be recovered by suit of the party injured, and the indictment also to be prosecuted in the Federal courts.

We are not aware that this act of Congress has been at all discussed by the court of last resort, and, so far as we can ascertain, it has been but seldom passed upon by the Federal judges of the lower courts. GILES, J., of the United States District Court for the District of Maryland, in a charge to a jury,³ assailed the constitutionality of the act, on the principle of the *Slaughter-House Cases*⁴ and subsequent cases,⁵ so far as it sought to inflict penalties for the violation of rights which, if at all existing, belonged to the injured parties as citizens of a State, and not to citizens of the United States as such, and therefore exempt from the control of Federal authority. Mr. District Judge DICK, of the same court for the Western District of North Carolina, in a charge to a grand jury, took a similar view of that part of the act relating to inn-keepers.⁶ SAWYER, J., of the Ninth Federal Circuit, is reported to have said of this law, in a case which arose from the refusal of a theatre manager to admit a colored person to his house: "Congress has no power to make such a law; though the Legislature of any State might perhaps do so."⁷ The management

¹ 95 U. S. 439.

² Acts 1874-5, p. 335, chap. 114.

³ *Cully v. Baltimore etc. R. Co.*, 1 Hughes, 536.

⁴ 16 Wall. 36.

⁵ *United States v. Reese*, 92 U. S. 214; *United States v. Cruikshank*, 92 U. S. 512.

⁶ The Civil-Rights Bill, 1 Hughes, 541.

⁷ See *Donnell v. The State*, 48 Miss. 661; *Sauvinet v. Walker*, 27 La. An. 14; *Peter's Case*, 9 Am. L. Rev. 164. But see *District v. Saville*, 9 Am. L. Rev. 584.

Notes.

of a theatre is a private enterprise; the proprietor conducts it for his own profit: it is his investment, and he can lay down the laws by which it shall be conducted, and the public has nothing to do with it."¹ In a case before ERSKINE, J., of the United States District Court for the District of Georgia, the facts were that the libellant applied for passage upon a steamboat and demanded admission to the cabin, occupied and reserved for white passengers, offering to pay the price charged for the same. The price tendered was refused, and she was directed to go to that portion of the boat reserved for colored people, which was substantially equal to the cabin occupied by white passengers. On her persistent refusal to do so, she was put off at the next landing-place of the boat. The court said: "Congress has not deemed it necessary or essential to the welfare of the colored citizen to enact any law forbidding interstate common carriers by water or land from regulating the business of their vessels or vehicles in such manner that the accommodations for colored passengers on their respective conveyances may be distinct and separate from those assigned to white passengers. Yet colored passengers are entitled to accommodations as suitable as those designated for the exclusive use of white passengers."²

It is apparent from the foregoing that the colored citizen may have the "full and equal enjoyment" of the accommodations of the carrier although he does not mingle with white passengers. Other judges have intimated that this is possible. "There is no principle of law, human or divine, that requires all men to be thrown into social *hotchpot* in order that their equality of civil rights may be secured and enforced. The Civil-Rights Bill neither imposes nor was intended to impose any such social obligation. It only proposes to provide for the enforcement of legal rights guaranteed to all citizens by the laws of the land, and leaves social rights and privileges to be regulated, as they have ever been, by the customs and usages of society."³

In *Hill v. De Cuir*,⁴ although this act was not under discussion, CLIFFORD, J., expressed views which are interesting as an exposition of general principles. Citing with approval the decision of the Supreme Court of Michigan in a case of this kind,⁵ he said: "The right to be carried is one thing, and the privilege of a passenger on board as to what part of the vessel may be occupied by him, is another and a very different thing; and they add that it is the latter, and not the former, which is subject to reasonable rules and regulations, and is, where such rules and regulations exist, to be determined by the proprietors.⁶ * * * Substantial equality of right is the law of the State and of the United States; but equality does not mean identity, as, in the nature of things, identity in the accommodation afforded to passengers, whether colored or white, is impossible unless our commercial marine shall undergo an entire change. Adult male passengers are never allowed a passage in the ladies' cabin, nor can all be accommodated, if the company is large, in the state-rooms. Passengers are entitled to proper diet and lodging; but the laws of the United States do not require the master of a steamer to put persons in the same apartment who would be repulsive or disagreeable to each other."⁷ And further, he cited

¹ 11 Am. L. Rev. 166.

² *Green v. The City of Bridgeton*, 9 Cent. L. J. 206, 208.

³ Per Dick, J., *The Civil-Rights Bill*, 1 Hughes, 541, 547.

⁴ 95 U. S. 485.

⁵ *Day v. Owen*, ante, p. 306.

⁶ 95 U. S. 501.

⁷ *Id.* 503.

According to Color.

with approbation the various decisions to the effect that equality of rights does not involve the necessity of educating white and colored persons in the same school.¹

Judicial authority is not wanting, however, in favor of a contrary construction of the language under discussion. Thus, in *Railroad Company v. Brown*,² which arose under a private act of Congress passed in 1863, granting certain privileges to a railroad corporation, accompanied with the provision, however, that "no person shall be excluded from the cars on account of color," it was held that this language meant that persons of color should travel in the same cars with white people, and that the enactment was not satisfied by the company providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively for white persons, and in fact the very cars which were at certain times assigned exclusively to white persons. DAVIS, J., said, in regard to the passage of this act: "It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all."³ And in *Coger v. North-Western Union Packet Company*,⁴ which was an action by a colored passenger for having been forcibly excluded from the dinner-table provided for passengers in general, and ordered to take her meals upon the guards of the boat or in the pantry, as it was customary for colored passengers, the court held that under the Fourteenth Amendment and the Civil-Rights Bill of 1866, which guaranteed to colored persons the right to make and enforce contracts, she had a right to the accommodations demanded.⁵

Railroad corporations are expressly prohibited by statute in Pennsylvania⁶ from this classification of their passengers; any person on account of color or race compelled to occupy any particular part of their cars may recover \$500 in an action of debt, as damages for this grievance.⁷ Under this statute, PAXSON, J., was of opinion that the mere fact that the plaintiff was excluded from a certain car, and directed to take a seat in another car equally comfortable, in which white persons were seated, was of itself no evidence that she was excluded on account of her color. "I do not think," said he, "it was intended by said act to give them superior privileges, or to so interfere with the reasonable police arrangement of railroad companies in operating their road and moving their cars as to enable a colored man to force himself into a car where, by reason of such police regulations, a white man may not enter. An ordinary traveller takes

¹ *The State v. McCann*, 21 Ohio St. 198; *Roberts v. Boston*, 5 Cush. 198; *The State v. Duffy*, 7 Nev. 342; *The People v. Easton*, 13 Abb. Pr. (N. S.) 160; *Dallas v. Fosdick*, 40 How. Pr. 249. See also *Cory v. Carter*, 48 Ind. 327. But see *Clark v. Board of Directors*, 24 Iowa, 267.

² 17 Wall. 445.

³ *Id.* 452.

⁴ 37 Iowa, 145.

⁵ In this case it will be observed that the conveniences accorded to colored persons were in no respect equal to those enjoyed

by white passengers, and the case is not an authority against the contention that a classification of passengers may be made without violating the provisions of the Supplemental Civil-Rights Bill of 1875. See this case disparagingly noticed by CLIFFORD, J., in *Hall v. De Cuir*, 95 U. S. 485, 507. Compare *Ellis v. Narragansett Steamship Co.*, 111 Mass. 146.

⁶ Act of March 22, 1867, Pamph. Laws, 38; 2 Bright. Purd. Dig. 1223, § 80.

⁷ *Central R. Co. v. Green*, 86 Pa. St. 427.

Notes.

his seat in such car as may be pointed out to him by those in charge of the train. In doing so, he recognizes the undoubted right of the company to designate the car which he shall enter. He has a right to a seat, but not to a seat in any particular car."¹

§ 8. Exclusion of "Runners" from Carrier's Vehicles and Premises. — The well-established right of carriers to make reasonable regulations for the conduct of passengers and others transacting business upon their premises, is accompanied by the right to exclude from their premises persons having no business with the carrier, and whose presence would be detrimental to his interests or the safety and convenience of passengers.² This rule follows naturally from the strict accountability to which the carrier is held for the safety of passengers and goods intrusted to his charge. It may be true that when the carrier constructs and opens station-houses designed for the reception of the public, by so doing an implied license is *primâ facie* given to all persons to enter his premises, and no person is a trespasser by merely entering therein. But such a license is revocable, and when revoked, the right to enter or remain is terminated.³ Thus, it has been held proper to exclude by force, if necessary, an innkeeper from a railroad depot, whose habit had been to enter the depot and annoy passengers by soliciting patronage for his house, having been previously notified that he must discontinue the practice.⁴ And such person's rights will not be enhanced in the premises even though he has in his possession a ticket entitling him to passage upon the defendant's railroad, and he enters the depot with the *bonâ fide* intention of taking the cars, if he fails to exhibit the ticket when ordered to leave the station, and his conduct is such as to induce the defendant's agent to believe that his intention is to continue to violate the regulations of the company.⁵ But the carrier's station-agent will not be justified in thus removing a person merely because, in his judgment, and without proof of the fact, he has violated regulations of the company, although he had conducted himself offensively to such agent personally.⁶

A person resorting to a railroad station for the purpose of taking a train should come within a reasonable time for this purpose next prior to the departure of the train. He has no right to come, it may be, hours before such departure, and insist upon his right to remain there merely because he intends to take passage on a train sometime.⁷ An omnibus proprietor who carries passengers and their luggage for hire, to and from a railway station, cannot maintain an action against the company for refusing to allow him to drive his vehicle into their station-yard. Said JERVIS, C. J., in this case: "It is not pretended that the plaintiff was using, or seeking to use, the railway. What right, then, can he have to say to the company, 'I will use your private property for my profit?'"

¹ Central R. Co. v. Green, 82 Pa. St. 426.

² Jencks v. Coleman, *ante*, p. 11; The Commonwealth v. Power, 7 Metc. 596; Harris v. Stevens, 31 Vt. 79; Barker v. Midland R. Co., 18 C. B. 46. See also Markham v. Brown, 8 N. H. 523.

³ The Commonwealth v. Power, and Harris v. Stevens, *supra*.

⁴ The Commonwealth v. Power, *supra*; Landrigan v. The State, 31 Ark. 50.

⁵ The Commonwealth v. Power, *supra*.

⁶ Hall v. Power, 12 Metc. 482.

⁷ Harris v. Stevens, 31 Vt. 79.

Trafficking on Carrier's Vehicle.

There is no pretence for the action. It has neither principle nor any color of authority to sustain it."¹

A carrier is not bound to give passage to a person who desires to use the facilities which such passage affords for trafficking purposes of his own. Any other rule would be demoralizing to good management.²

¹ *Barker v. Midland R. Co.*, 18 C. B. 46, 58.

v. The D. R. Martin, 11 Blatchf. 233; s. c. 5 Ch. Leg. N. 535; *sub nom.* *Barney v. The Oyster Bay & Steamboat Co.*, 67 N. Y. 301.

² *Jencks v. Coleman*, *ante*, p. 11; *Barney*

CHAPTER X.

LIABILITY OF THE CARRIER FOR ASSAULTS UPON PASSENGERS BY HIS SERVANTS.

LEADING CASE: *Pendleton v. Kinsley*.—This liability arises out of the contract of carriage, and does not depend upon the consideration whether at the time of the assault the servant was acting within the scope of his employment.

- NOTES: § 1. Wanton and malicious trespasses of servants.
2. Servant acting in the scope of his employment.
3. Authority of servants of carrier to make arrests.
4. Use of excessive force by the servant in the execution of the carrier's business.
5. *Résumé* of the circumstances justifying ejection of passenger.
6. Where persons may be expelled from a railroad train.
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PENDLETON *v.* KINSLEY.*

Circuit Court of the United States, Rhode Island District, 1871.

Before Hon. NATHAN CLIFFORD, LL.D., *Associate Justice of the Supreme Court, assigned to said Circuit.*

1. **Unwarrantable Assaults upon Passengers by the Carrier's Servants are Breaches of the Contract of Carriage, and as such impose Liability upon the Carrier.**—The principles of law applicable to the relations of master and servant do not fully define the rights, duties, and obligations between carriers and their passengers. They are not merely citizens, bearing only towards each other the relations which one citizen bears to another. The carrier agrees to carry for hire the passenger from one place to another, and is responsible for any breach of the obligation thus assumed, in ill-usage of the passenger by himself or employees. Passengers do not only contract for room and transportation, but for good treatment, and it is the duty of the owners to use due care and exertion to protect them from any degree of violence, abuse, or ill-treatment from other passengers, or the carrier's servants, or other persons coming on board during the trip. The principal in this class of cases is liable for the misconduct of the employee, when it occasions injury to the passenger, whether arising from malice or neglect.
2. **Case in Judgment.**—While collecting fares during one of the regular trips of a steamer owned by the defendant, the clerk of the steamer engaged in a dispute with the plaintiff, a passenger, as to his fare, and inflicted personal injuries upon him. It was held, irrespective of the dispute, and as if none had arisen, that the plaintiff could recover for the injuries received, although the defendant did not authorize the acts of his employee.

* Reported, 3 Cliff. 416.

United States Circuit Court, Rhode Island.

CASE against the defendant to recover damages for injuries resulting to the plaintiff from an assault and battery alleged to have been inflicted upon him by one Charles L. Stanhope. Personal injuries were inflicted on the plaintiff by Charles L. Stanhope, clerk of the steamboat Perry, employed at the time and for many years before in carrying passengers and freight between Newport and Providence, in this district, and he brought action against the defendant, as the owner of the steamer, to recover compensation for the injuries so inflicted while he was a passenger on board the steamer. Service having been made upon the defendant, he appeared and pleaded the general issue, and upon that issue the parties went to trial, and the jury, under the instructions of the court, returned a verdict for the defendant, subject to the opinion of the court upon questions of law reserved by the court for further consideration. Evidence was introduced by the plaintiff sufficient to warrant the jury in finding that the defendant was owner of the steamer for the voyage, — as it appeared that the record-title of the steamer was in his name; that the clerk was in the employment of the defendant. and that the steamer was not under charter to any other person.

Business made it necessary for the plaintiff to go to Providence on the 29th of August, 1862, and, being at Newport at the time, he went on board of the steamer for that purpose before she started from Newport on her morning trip to the former place. He had often passed over that route in that steamer before, and, having been accustomed to purchase tickets for the trip, of the clerk of the steamer, he applied to him for one on this occasion, within a short time after he went on board, and offered him a one-dollar bill on one of the national banks of the State to pay for the ticket. The price of tickets was fifty cents, and the witness states that he had frequently offered bills for tickets before that time, and seen others do the same thing, and that the clerk always received the bills and made change without any objection. On this occasion, however, he refused to take the bill or give him a ticket, saying that he had no change; to which the plaintiff replied: "If you have no change, give me postage-stamps." But the clerk replied to that suggestion, that he had no postage-stamps, and suggested that the plaintiff would have to take two tickets; to which the plaintiff replied that he did not want two tickets, adding that he was not accustomed to purchase tickets in advance. Whereupon the plaintiff left the main deck, where the office of the clerk was, and went to the saloon-deck, above, where there were many gentlemen and ladies and children sitting on the settees facing the stern of the steamer. Nothing further of importance occurred till after the steamer passed Portsmouth Grove, when the

Pendleton v. Kinsley.

express-agent came round to collect the tickets from the passengers, as he sometimes did, in the place of the clerk who had charge of that business. He went to the plaintiff and asked for his ticket, but the plaintiff told him that he had none; that he offered to pay for one when he first came on board, and that the offer which he made was refused; to which the express-agent replied, "You will have it to pay," and passed along. In a few minutes the clerk and the express-agent came up together, and the clerk demanded pay for his fare of the plaintiff; but the plaintiff replied substantially as before, that he had once offered to pay for a ticket, and that he (the clerk) had refused to accept the pay for the same. Here the conversation ended, but the clerk seized the plaintiff by the collar and pulled him violently from the settee where he was sitting, pushed him from there to the companion-way, and shoved him down those steps to the main deck, near where he was when he offered to purchase and pay for a ticket, and from there he pushed him to the companion-way leading to the lower deck, and shoved him down that passage-way also to the lower cabin, and set him down violently on the seat near the berths, and left him without any explanation. Left alone, he remained there for a short time, and then went to the saloon-deck, where he was when he was assaulted; and on the arrival of the steamer at Providence he left her unmolested, and on the following day returned to his own residence.

Evidence was introduced by the plaintiff tending to show that he was seriously injured in his back and other parts of his body, and that the injuries were of a permanent character. Much testimony was introduced as to the extent of his injuries, but it is unnecessary to refer to it in this report, as the defendant at the close of the plaintiff's case moved the court to instruct the jury that in view of the whole evidence the plaintiff could not recover, and that their verdict should be for the defendant, and the court gave that instruction as requested. After the verdict a motion for a new trial was duly filed by the plaintiff, and the parties were heard upon the question whether the defendant, in any view of the evidence, was liable for the assault committed on the plaintiff by the clerk of the steamer.

J. M. Blake and *F. W. Miner*, for plaintiff; *W. P. Sheffield*, for defendant.

CLIFFORD, J.—Owners of vessels engaged in carrying passengers assume obligations somewhat different from those whose vessels are employed as common carriers of merchandise. Obligations of the kind in the former case are in some respects less extensive and more qualified than in the latter, as the owners of the vessel carrying pas-

United States Circuit Court, Rhode Island.

sengers are not insurers of the lives of their passengers, nor even of their safety, but in most other respects the obligations assumed are equally comprehensive and stringent. Carriers of passengers by land, it was said in one of the early cases, are not liable for injuries happening to passengers from unforeseen accident or misfortune, where there has been no negligence or default; but it was held in the same case that the smallest negligence would render the carrier liable, and that the question of negligence was for the jury.¹ Where the injury for which the action was brought resulted from the breaking of the axle of the coach, the court held, in the case of *Christie v. Griggs*,² that "when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied," subject, of course, to opposing testimony; that the question of negligence was for the jury; that if it appeared that the axletree was sound, "as far as the human eye could discover," the defendant was not liable; that there was a difference between a contract to carry goods and a contract to carry passengers; that the carrier of goods was liable at all events; that the carrier of passengers did not warrant their safety; that his undertaking went no further than that he would provide for their safe conveyance, as far as human care and foresight could go; that the owner was liable if there was the least negligence; but that the plaintiff had no remedy for the misfortune, if the breaking down of the coach was purely accidental. Attempts have been made to show that the rule laid down in the case of *Sharp v. Grey*³ is more stringent against the owner, but the question submitted to the jury in that case was whether the degree of vigilance practised by the defendant was such as was required by his engagement, and two at least of the judges concurred in refusing the motion for the new trial upon the ground that the question was one of fact for the jury. The remarks of the chief justice in the case of *Crofts v. Waterhouse*⁴ are sometimes referred to as advancing a more stringent rule, but the opinion, taken as a whole, furnishes no support to the suggestion, and his associate on the occasion stated in terms that a carrier of passengers is only liable for negligence. Proprietors of stage-coaches, it is held in the case of *Ingalls v. Bills*,⁵ are not answerable for an injury to a passenger which happens by reason of a hidden defect in an iron axletree, which defect, being entirely surrounded by sound iron one-fourth of an inch thick, could not be discovered by the most careful external examination. Carriers of passengers by railways or steamers are bound to greater precautions, and to a higher degree of care,

¹ *Aston v. Heaven*, 2 Esp. 533.² 9 Bing. 457.³ 3 Bing. 319.⁴ 2 Camp. 79; s. c. *ante*, p. 181.⁵ 9 Metc. 1; s. c. *ante*, p. 112.

Pendleton v. Kinsley.

skill, and vigilance in the preparation and management of the vehicles or means of conveyance, than are required of the owners of stage-coaches, because the car of the railway proprietor and the steamer of the carrier by water are intended to sustain far greater weight, and are to be propelled by much greater power and at much greater speed.¹

Passengers must take the risk incident to the mode of travel which they select; but those risks, in the legal sense, are only such as the utmost care, skill, and caution of the carrier in the preparation and management of the means of conveyance are unable to avert.² Damages were claimed by the plaintiff in that case for injuries received by the breaking of the axle of a railway car in which he was riding, and the defence was that the car was a new one, recently purchased of a manufacturer, of skill and good repute, and that it was carefully examined at the time of the purchase; that the track was in good condition; that the speed of the train was not excessive; and that the employees were sufficient in number and of sufficient experience and skill, and that they were guilty of no negligence; but the court instructed the jury that it made no difference whether the car was constructed by the company or purchased of an experienced manufacturer, as the defendants were liable in either event if the defect could have been discovered in the process of manufacturing the axle or car, by the application of any test known to men skilled in that business, and the Court of Appeals affirmed the judgment. They held that the carrier of passengers was bound to the utmost precaution, care, and skill in the preparation and management of the means of conveyance; but they conceded that the carriers of passengers were not insurers, and that latent defects might exist in machinery, undiscoverable by the most improved and vigilant examination, and from which the most serious accidents may occur.

Expressions are found in the opinion of the court in the case of *Boyce v. Anderson*³ which leave it to be inferred that the court was of the opinion that the carriers of passengers were only required to exercise ordinary skill and care to secure their safety; but the correct rule is stated in the case of *Stokes v. Saltonstall*,⁴ where the same court held that proof of the accident and alleged injury afforded a *prima facie* presumption that there was carelessness, negligence, or want of skill on the part of the driver; that, it being admitted that the carriage was upset, and that the plaintiff was injured, it was incumbent on the defendant to prove that the driver was a person of competent skill, of

¹ *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 387.

² *Hegeman v. Western R. Co.*, 13 N. Y. 24; *s. c. ante*, p. 160.

³ 2 Pet. 150.

⁴ 13 Pet. 181; *s. c. ante*, p. 183.

United States Circuit Court, Rhode Island.

good habits, and in every respect qualified and suitably prepared for the business in which he was engaged, and that he acted on the occasion with reasonable skill, and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence or want of skill or prudence on his part, then the defendant, as the owner of the coach, was liable in that action.¹ Negligence in the smallest degree renders the carrier liable; and there is one case in which it was held that a railroad corporation was liable for injuries to a passenger caused by a defect in an iron axle of a car, although it was of such a character that it could not have been discovered by any practicable mode of examination; but the rule there laid down is expressly disapproved in a recent judgment of the Exchequer Chamber, and cannot be adopted in this circuit until it is approved by the Supreme Court.² Such carriers are not insurers against accidents, nor are they required to do what is impossible in the nature of things.³ Undoubtedly they are bound to the highest degree of care, prudence, and caution; but if the injury results from a hidden defect in the car, engine, or other apparatus, unknown at the time, and which could not be detected by any known means, they are not responsible, because the obligation which they assumed did not require what it was not in their power to perform.⁴ Whether the owners of a vessel engaged in carrying passengers by water are or are not insurers as to the seaworthiness of the vessel, it is not necessary to inquire, as no complaint is made in this case that the steamer was not in a seaworthy condition.⁵ Passengers, however, contract with the proprietors or owners of the conveyance, and not with their agents as principals, and the question of the liability of the proprietor or owner is wholly unaffected by the fact that the defective car, engine, or other apparatus was purchased of another, if the defect was one which might have been discovered by any known means. Whether their engine or car was manufactured at their shop or was purchased of other manufacturers, the company is equally liable to see that in the construction no care or skill was omitted for the purpose of making the car or engine as safe as the utmost care and reasonable skill could make it. Precautions of the kind are required of the carrier to provide for

¹ *Hall v. Connecticut River Steamboat Co.*, 13 Conn. 326; *Briggs v. Taylor*, 28 Vt. 180; *Redf. on Rys.* 175; *Galena etc. R. Co. v. Yarwood*, 17 Ill. 509.

² *Alden v. New York etc. R. Co.*, 26 N. Y. 102; *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412; s. c. L. R. 4 Q. B. 379, *ante*, p. 124; *Simmons v. Steamboat Co.*, 97 Mass. 368.

³ 1 Smith's Ld. Cas. (5th ed.) 328.

⁴ *McElroy v. Nashua R. Co.*, 4 Cush. 400; *Story on Bail*. 581.

⁵ 3 Kent's Comm. (11th ed.) 205; *Lyon v. Mells*, 5 East, 428; *Putnam v. Wood*, 3 Mass. 481; *Silva v. Low*, 1 Johns. Cas. 184; *Whitall v. The William Henry*, 4 La. 223.

Pendleton v. Kinsley.

the safety of passengers; but the obligation which the carrier assumes in that behalf extends beyond the specified requirements in respect to the vehicle, car, or other means of conveyance, and also includes an implied stipulation for good treatment of the passenger during the passage, trip, or voyage, and especially against ill-treatment by the carrier or his employees, and against every degree of violence on their part, or wanton interference with his person. Mistakes occur in such litigations by overlooking the fact that it is the carrier, whether corporation or natural person, that assumes these obligations, and not the driver, master, or conductor of the conveyance, for the breach of which a right of action accrues to the passenger. Breaches of the obligation assumed by the carrier for proper treatment of his passengers, it is conceded, would give a right of action to the passenger if the acts constituting the breach were committed by the carrier himself; but the argument is that the carrier is not responsible for any wilful trespass committed by the driver, conductor, or master, unless it be shown either that he authorized the act, or ratified it after it was committed.

Many decided cases may be found where it is held that the master is not liable for the wilful act of his servant, unless previously authorized or subsequently ratified; but none of these cases can have any proper application to the controversy before the court.¹ Examined carefully, it will be found that all, or nearly all, of those decisions may be divided into two classes, neither of which will afford much aid in the solution of the question involved in the present motion: 1. Cases where it is held that trespass will not lie against the master for the wrongful act of his servant; 2. Controversies where it appears that the acts of the servant constituting the cause of action were not done by the servant in the course of his employment.

Doubts are expressed by an able text-writer whether the court in the leading case ever intended to decide more than that the master is not liable in trespass for the wilful act of the servant; and it must be admitted that the reasons assigned for the conclusion are well put, and that they are entitled to great consideration.² Suppose that view, however, is not correct, then it is clear that the rule laid down in that case is not applicable in actions against corporations, as it is well settled that they are responsible for acts done by their agents, "either *in contractu* or *in delicto*," if done "in the course of its business and of their employment."³

¹ *McManus v. Crickett*, 1 East, 103; *Croft v. Alison*, 4 Barn. & Ald. 590; *Wright v. Wilcox*, 19 Wend. 343.

² 1 Redf. on Rys. (3d ed.) 512.

³ *Phila. etc. R. Co. v. Quigley*, 21 How. 210; *Moore v. Fitchburg R. Co.*, 4 Gray, 465;

United States Circuit Court, Rhode Island.

Extended remarks respecting the second class of cases is unnecessary, as it fully appears that the clerk, in collecting the tickets, was engaged in the business of the defendant, and was in the course of his employment. Masters are bound by the acts of their servants whenever there is an express command of the master to make a contract or do an injury, or where a servant does an injury in the immediate pursuit of his master's business, or where an injury arises to another through the negligence or want of skill of the servant.¹ Questions of the kind also involve to some extent the relations, obligations, and liabilities of principal and agent, as in many cases the act of the agent is the act of the principal, and it is well settled that the representations, declarations, and admissions of the agent in the course of his agency are deemed a part of the *res gestæ*, and are equally obligatory upon the principal as if made by himself. Principals are not in general responsible for the criminal acts or misdeeds of their agents, but they are held liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligence, and other malfeasances or misfeasances and omissions of duty of their agents in the course of their employment, though they did not authorize the acts, nor participate in the transaction, and even if they forbade or disapproved what was done. Such, in substance, are the views of Judge STORY, as expressed in his work on Agency; and the Supreme Court have decided that the rule of *respondeat superior*, or that the master shall be civilly responsible for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent or deceitful; that if it be done in the course of the employment of the servant, the master is liable; and that it makes no difference that the master did not authorize or know of the act or neglect, or even if he disapproved or forbade it, he is equally liable if the act be done by the servant in the course of his employment.²

Tested by these considerations, it is quite clear that the instruction given by the court to the jury was erroneous, and that the verdict should be set aside and a new trial granted. But the court is of the opinion that the principles of law applicable in litigations growing out of the relations of principal and agent or master and servant are not the principles which fully define the rights, duties, obligations, and liabilities of

Maud v. Monmouth Canal Co., 4 Man. & G. 452; Phila. etc. R. Co. v. Derby, 14 How. 483; s. c. ante, p. 31; National Express Co. v. Drew, 2 Macq. H. L. Cas. 103; s. c. 33 Eng. Law & Eq. 1; 1 Pat. Sc. App. 482; Goff v. Great Northern R. Co., 3 El. & El. 674.

¹ Reeve's Dom. Rel. (3d ed.) 356.

² Story on Agency, § 452; Phila. etc. R. Co. v. Derby, 14 How. Pr. 486; s. c. ante p. 31; Smith's M. & S. 152; Sleath v. Wilson, 9 Car. & P. 607; The New World v. King, 16 How. 474; s. c. ante, p. 175.

Pendleton v. Kinsley.

the parties to this controversy. They are not strangers bearing no other relations to each other than one citizen, merely as such, bears to another; but the defendant was a carrier of passengers by water, and the plaintiff was a passenger on board the steamer of the defendant, which was engaged in carrying passengers for hire between two commercial ports. Difficulty occurred as to making change in the sale and purchase of a ticket for the trip, but the court lays that circumstance out of the case, as it is clear that the omission to purchase a ticket gave the clerk of the steamer no right whatever to inflict any personal violence on the plaintiff. Fare not having been paid by the plaintiff, the carrier, if he thought proper, might have requested him to leave the steamer; and if the request had been seasonably made, and the plaintiff had refused to pay or leave, the carrier might at a proper time and place have stopped the steamer, and might have removed the plaintiff from the steamer to the shore, taking care to use no more force than was reasonably necessary for that purpose.

Nothing of the kind, however, was done or attempted, and the question as to the rights, duties, obligations, and liabilities of the parties to the suit must be determined solely in view of the facts as stated in the commencement of the opinion. Viewed in that light, as the case must be, then it appears that the clerk of the steamer demanded fare of the plaintiff, and that the plaintiff having refused to pay as requested, the clerk seized him by the collar, and inflicted personal violence upon him in the manner and by the means set forth in the statement. Unjustifiable as the conduct of the clerk was, the case must be viewed, as between these parties, just as it would be if no dispute had arisen as to the fare, and the questions to be decided are whether the defendant is liable for the injuries inflicted upon the plaintiff by the clerk, and, if so, upon what ground does that liability rest. Sufficient has already been remarked to show that the owner of the steamer is liable to the plaintiff for the injuries inflicted upon him by the agent of the owner, but it is quite important, in case of a new trial, to ascertain upon what ground that liability arises, — whether merely as a principal answering for the acts of his agent in the course of his employment, or as a carrier of passengers answering as such, for a breach of the obligation which he assumed as such carrier, that the plaintiff, as his passenger, should not be ill-treated by himself or his employees, and that he and they should use all due care and proper exertion to protect him, as such passenger, from any degree of violence or any kind of abuse or ill-treatment from other passengers, or other persons coming on board during the trip.¹

¹ Flint v. Norwich etc. Transp. Co., 34 Conn. 554.

 United States Circuit Court, Rhode Island.

Ship-owners, as well as the proprietors of conveyances by land, select and appoint their own agents without consulting their passengers, and it is but reasonable that they should be held responsible for any act of violence to the passenger of which such employees may be guilty, as the moment the passenger enters the steamer or other conveyance he is more or less under the control of the master or conductor, and subject to their orders. Fit or unfit, humane or brutal, good-tempered or morose, the passenger is comparatively helpless, and may be obliged to submit for the time without any means of redress. He may have his remedy against the carrier, it is said, if he can prove that the carrier was negligent, or that the active person was the agent of the carrier and was in the course of his employment, but, if not, he must be content with his remedy against the assailant of his person. Adjudged cases may be referred to which support that proposition without qualification, but they do not give full scope and effect to the obligation which the carrier assumes towards his passenger, nor to the rights and duties which those relations create and imply.

Passengers do not contract merely for shiproom and transportation from one place to another, but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance, and for the fulfilment of those obligations the carrier is responsible as principal; and the injured party, in case the obligation of good treatment is broken, whether by the principal or his employees, may proceed against the carrier as the party bound to make compensation for the breach of the obligation.¹ Sickness and suffering were experienced by the wife of the plaintiff, in the case of *Weed v. Panama Railroad Company*, in consequence of the failure of the train to arrive at the usual time, and the evidence showed that the detention was the wilful act of the conductor. Proof of that fact having been given, the defendants contended that they were not liable; but the court refused so to instruct the jury, and the Court of Appeals held that the prayer for instruction was properly refused, as the proof offered that the act of the conductor was wilful constituted no defence to the action. High authority exists, if any be needed, in support of the proposition that the owners of a vessel are responsible for the whole conduct of the master while he is on board and in command of the vessel, unless his acts amount to a criminal offence.² Civilly speaking,

¹ *Chamberlain v. Chandler*, 3 Mason, 246; *Nieto v. Clark*, 1 Cliff. 145; *Weed v. Panama R. Co.*, 17 N. Y. 362; *Keene v. Liz*²

ardi, 5 La. 431; *Block v. Bannerman*, 10 La. An. 3.

² *The Nimrod*, 7 Notes of Cas. 559.

Pendleton v. Kinsley.

says Dr. Lushington, in that case the owners are responsible for any deviation of the master from that line of conduct which it behooves him to perform, not simply in the navigation of the vessel and in the care of his own seamen, but in the care of those who may be thrown on board his ship, even by an accident, as was the fact in that case. Most of the recent cases in which the principle involved in such a controversy is considered, proceed upon the ground that where the misconduct of an agent causes a breach of the obligation or contract of the principal, then the principal is liable in an action to the injured party, whether such misconduct be wilful or malicious or merely negligent; and it would seem that it must be so, as the cause of action arises from the breach of the obligation, and if so, it cannot make any difference whether the breach was occasioned by the act of the principal or of his employees. *Qui facit per alium, facit per se*.¹

Conductors and employees of a railroad company represent the company in the discharge of their functions, and, being in the line of their duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of their authority, whether of omission or commission; and the same rule must be applied in a suit against the owner of a steamer as the carrier of passengers for the misconduct of the master, as the owners of a vessel carrying passengers for hire are liable for breaches of duty of the master to the passengers equally as they are in case of merchandise committed to their care.² Owners are liable for the conduct of the master, as master, during the voyage, and for any ill-treatment of the passengers by the master in his capacity as such, a remedy may be had against the vessel herself.³ Vessels carrying passengers for hire, says Mr. Justice NELSON, stand on the same footing of responsibility as those carrying merchandise, the passage-money in the former case being the equivalent for the freight in the latter; that the vessel as well as the owner is responsible for a breach of a contract with the passenger.⁴ Repeated decisions of the Supreme Court of Massachusetts are to the same effect, as will sufficiently appear by the following citations: *Moore v. Fitchburgh Railroad Company*,⁵ *Hewett v. Swift*.⁶ Wherever there is a contract between the master and another, the master, says HOAR, J., is responsible for the acts of his servant in executing the contract, although the act is fraudulent and

¹ Milwaukee etc. R. Co. v. Finney, 10 Wis. 388; Goddard v. Grand Trunk R. Co., 57 Me. 202; Pittsburgh etc. R. Co. v. Hinds, 53 Pa. St. 515; s. c. ante, p. 295.

² 3 Kent's Comm. (ed. 1866) 160; Baltimore etc. R. Co. v. Blocher, 27 Md. 236; Keene v.

Lizardi, 5 La. 431; Sanford v. Eighth Avenue R. Co., 23 N. Y. 344.

³ Abb. Adm. 257.

⁴ The Aberfoyle, 1 Blatchf. 360; Pars. on Ship. 30; The Revenge, 3 Wash. 267; Ralston v. Steamer State Rights, Crabbe, 46.

⁵ 4 Gray, 465.

⁶ 3 Allen, 423.

 Wanton and Malicious Trespasses of Servants.

one without his consent.¹ Examined in any point of view, the court is of opinion that the instruction given to the jury was erroneous, and the verdict is set aside and a

New trial granted.

 NOTES.

§ 1. **Wanton and Malicious Trespasses of Servants.**—In *McManus v. Crickett*,² Lord KENYON greatly desired to settle the law in regard to the liability of the master for the acts of his servants, saying: "It is a question of very general concern, and has been often canvassed: but I hope at last it will be at rest." This case is authority for the proposition that a master is not liable for the malicious acts of his servant, which, generally speaking, is true; but the proposition has many qualifications, so that the case establishes only a general principle. This principle, too, has more especial application in actions of tort for injuries inflicted by the servants upon third persons, where the master owes no especial duty of protection to the injured person, other than that which each citizen owes to every other, as expressed in the maxim, *Sic utere tuo ut alienum non lædas*. But when by express contract the master owes a duty of protection to third persons, or when this obligation is implied by virtue of another contract, as that between carrier and passenger, the former being under the obligation to exercise the highest degree of care of which human foresight is capable, for the benefit of the latter, the master cannot, by entrusting the performance of this duty to others, shield himself from the consequences of his servants' misconduct by asserting that they have acted in disregard of instructions, or otherwise have proved false to their trust.³

It is not consonant with the principle of *respondeat superior* that an exception or qualification of this kind should be introduced to completely obviate the salutary operation of the rule. Corporations can act only through their agents, and if the torts of such agents constitute no wrong on the part of the corporate organization, then it follows that a corporation can do no wrong. Said RYAN, C. J., in a late and most instructive case upon this point:⁴ "Where was the corporation, and by whom represented, as to this contract and this passenger? Not, surely, in some foreign board-room, by directors making regulations and appointing agencies for the corporate business. They could not perform this contract. Not, surely, in some distant office, by a superintendent or manager issuing the orders of the directors to his subordinates. He could not perform this contract. *Quoad* this contract and this passenger, the corporation was present on this train, to keep it and to care for her, represented by the officers of the train, who possessed, *pro hac vice*, the whole power and authority, and were the living

¹ *Howe v. Newmarch*, 12 Allen, 55; *Seymour v. Greenwood*, 7 Hurl. & N. 357; *Ayerigg's Executors v. New York etc. R. Co.*, 30 N. J. L. 462; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 370.

² 1 East, 106. See 2 Thomp. on Neg., p. 865.

³ *Phila. etc. R. Co. v. Derby*, 14 How. 468, *ante*, p. 31.

⁴ *Craker v. Chicago etc. R. Co.*, 36 Wis. 657, 673.

Notes.

embodiment of the ideal entity which made the contract and was bound to keep it. And is appellant here to contend that it has no responsibility for the flagrant violation of the contract, which the respondent paid it to make and to keep, by its sole representative appointed to keep it on its behalf? Like the English crown, it lays its sins upon its servants, and claims that it can do no wrong. We cannot bend down the law to such a convenience. The appellant tortiously broke this contract as surely as it made it, — committed this tort as surely as it made the contract."

What duties, besides that of transportation merely, rest upon the carrier may be illustrated by the frequently approved language of an enlightened jurist: "An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound so to regulate his house, as well with regard to the peace and comfort of his guests who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound to exclude, from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order."¹ An exemplification of these remarks is found in the rule which enjoins upon the carrier the duty of protecting the passengers from the assaults of fellow-passengers or trespassers during the subsistence of the contract of transportation.²

Such being the liability of the carrier for the conduct of strangers, can it be said that he is less responsible for acts of violence of his own servants? *A fortiori*, it would seem that he is not.³ The wilfulness of the servant's act is no excuse, so long as it amounts to a breach of the contract;⁴ nor the fact that the act is wholly disconnected from his duties, and a purely wanton assault. Thus, in *Craker v. Chicago, etc. Railroad Company*,⁵ the defendant's conductor forcibly seized and kissed a young lady while a passenger on his train, for which act the railroad company was held responsible. In *Milwaukee, etc. Railroad Company v. Finney*,⁶ it was urged that in no case could a right of action arise against the principal for the wilful or malicious conduct of the agent, unless it was previously authorized or subsequently ratified by him. The court stated that, on a careful examination of the position, they were satisfied that it was incorrect; that the proper rule was, that where the misconduct of the agent caused a breach of the obligation or contract of the principal, the principal would be liable, whether such conduct be wilful or malicious, or merely negligent.⁷

In *Keene v. Lizardi*,⁸ it was stated that the owners of vessels carrying pas-

¹ Shaw, C. J., in *The Commonwealth v. Power*, 7 Metc. 596, 601, citing *Markham v. Brown*, 8 N. H. 532.

² *Pittsburgh etc. R. Co. v. Hinds*, ante, p. 295; *Putnam v. Broadway etc. R. Co.*, 55 N. Y. 108; *Flint v. Norwich etc. Transp. Co.*, 34 Conn. 554; s. c. 6 Blatchf. 158; *Pittsburgh etc. R. Co. v. Pillow*, 76 Pa. St. 510; *New Orleans etc. R. Co. v. Burke*, 53 Miss. 200; s. c. 4 Cent. L. J. 539; *Holly v. Atlanta Street R. Co.* (Sup. Ct. Ga.), 7 Reporter, 460; *Sherley*

v. Billings, 8 Bush, 147. See Chap. VIII., ante, where this matter is considered at length.

³ *Goddard v. Grand Trunk R. Co.*, 57 Me. 202.

⁴ *Weed v. Panama R. Co.*, 17 N. Y. 362.

⁵ 36 Wis. 657.

⁶ 10 Wis. 388.

⁷ See also *Quigley v. Central Pacific R. Co.*, 11 Nev. 350.

⁸ 5 La. 431; s. c. 6 La. 315. See also *Block v. Bannerman*, 10 La. An. 1; *St. Amand v.*

Wanton and Malicious Trespasses of Servants.

sengers for money subjected themselves to the same responsibility for a breach of duty in their officers to those passengers, as they would for their misconduct in regard to merchandise committed to their care.¹ The case of *Goddard v. Grand Trunk Railway*² is instructive upon this point. The plaintiff having surrendered his ticket to a brakeman authorized to receive it, was afterwards approached by the person to whom he had given it, and accused of endeavoring to avoid the payment of his fare. Furthermore, this employee began a tirade of abusive language, which was supplemented by the most atrocious conduct. The plaintiff, a person in ill-health, reclined in his seat, wholly unable to respond to the charge or make any explanation; the servant, bringing his fist in close proximity to the plaintiff's face, shaking it violently, threatened to spill his brains on the spot if he opened his mouth. This extraordinary exhibition was not momentary, but was prolonged for the space of about a quarter of an hour, in the presence of several passengers of both sexes. The ticket was subsequently produced and identified by the conductor, to whom the brakeman had delivered it only a few moments before. At the trial, the defendants claimed that they were wholly irresponsible for their servant's conduct, on the ground that it was wilful and malicious, and wholly unauthorized by them. But said WALTON, J.: "The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he [the carrier] is under to his passenger, and the duty which he owes a stranger. It may be true that if the carrier's servant wilfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. * * * The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable."³

Lizardi, 4 La. 243. In order to justify the imprisonment of a passenger on shipboard on the ground that the measure was necessary for the due preservation of discipline, it must appear that there was such real appearance of danger to the discipline of the ship from the language or conduct of the plaintiff as might induce a reasonable man to believe in the existence of such danger. *Aldworth v. Stewart*, 4 Fost. & Fin. 957; *King v. Franklin*, 1 Fost. & Fin. 360; *Prendergast v. Compton*, 8 Car. & P. 454. Conduct unbecoming a gentleman will justify the captain in excluding a passenger from the table, although he has contracted for a place at such table. *Prendergast v. Compton*, *supra*.

¹ In this case, the plaintiff and his wife were treated with great indignity and insult, arising purely from the malice of the commanding officer. The decision of the court was based upon that of *Story, J.*, in *Cham-*

berlain v. Chandler, 3 Mason, 242, where, in regard to the contract of carriage, he said: "In respect to females, it proceeds yet farther; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors by the excitement of terror and cool malignancy of conduct to inflict torture upon susceptible minds." These views are reiterated by *Clifford, J.*, in *Nieto v. Clark*, 1 Cliff. 145.

² 57 Me. 202. *Malecek v. Tower Grove etc. R. Co.*, 57 Mo. 18, exhibits an almost identical state of facts. See also *Sherley v. Billings*, 8 Bush, 147, where *Goddard v. Grand Trunk Railway* is expressly approved.

³ 57 Me. 213. See also the remarks of *Willard, J.*, in *Brand v. Troy etc. R. Co.*, 8 Barb. 368, 378. The same learned justice who expressed the enlightened views above

Notes.

The Supreme Judicial Court of Massachusetts have adopted the same rule, as will be seen by an examination of *Bryant v. Rich*.¹ The servants of the carrier in this case assaulted and beat a passenger simply because he had remonstrated against the tyrannical conduct of the servants of the carrier towards a fellow-passenger, his relative. The plaintiff had made no show of force, and the assault was wholly inexcusable. After citing with approval the case of *Goddard v. Grand Trunk Railway*,² CHAPMAN, C. J., continued: "The interpretation of the contract of the carrier which is given in the cases above cited is not unreasonable. It is not more extensive than the necessities of the case require. Nor is it difficult to perform. The cases in which it is violated by servants, even of the lowest grade, on board a ship or engaged in the management of a railroad train, are rare, and the carrier, rather than the passenger, ought to take the risk of such exceptional cases,—the passenger being necessarily placed so much within the power of the servants;"³ Mr. Justice CLIFFORD reviewed the foregoing decisions in *Pendleton v. Kinsley*,⁴ and reached the same conclusion.

§ 2. *Servant acting in the Scope of his Employment.*—If the carrier is to be held responsible for the wilful, wanton, and malicious act of his servant which amounts to a breach of the contract of carriage, it would seem to be unnecessary to consider whether, at the time the unlawful act of the servant took place, he was acting in the scope of his employment and according to the instructions of his master; also, whether the act was in any manner subsequently ratified by the master. There are many cases, however, which do not go to the extent of declaring that the carrier shall be held responsible for the wilful misconduct of his servant when his act may be considered as outside of the legitimate scope of his duties, although if the act could in any manner be imputed to the carrier personally, it would amount to a breach of the contract for safe carriage. Thus, in *Isaacs v. Third Avenue Railroad Company*,⁵ the plaintiff came to the rear platform of a street car, and desired the conductor to have the car come to a full stop in order that she might get off; to which request he replied that the car was stopped sufficiently, although it was yet in motion. The plaintiff told the conductor that she would not get off until the car had completely stopped. Thereupon the conductor seized the plaintiff by the shoulder with both hands, and threw her out with such violence that her leg was broken by her fall upon the pavement. The court held that the principal was not responsible for this misconduct of its servant, and assigned as a reason, *inter alia*, that "the defendant could not lawfully have done it, and therefore no authority could be implied in the conductor to do it." The facility with which the Gordian knot of *respondeat superior* is thus cleft to the heart must be

set forth, again applied them in the subsequent case of *Hanson v. European etc. R. Co.*, 62 Me. 84, where a brakeman, having been worsted in a difficulty with a passenger, after the quarrel had ended came up from behind and inflicted several blows upon the passenger's head with an iron stove-poker. The court held that although the brakeman was obstructed in the performance of his duty in the first instance,

yet, the struggle having ended, the company was to be held responsible for the wanton act of its servant in renewing the strife.

¹ 106 Mass. 180.

² 57 Me. 202.

³ 106 Mass. 189. See also the case of *Ramsden v. Boston etc. R. Co.*, 104 Mass. 117.

⁴ 3 Cliff. 416, *ante*, p. 352.

⁵ 47 N. Y. 122. See also *Evansville etc. R. Co. v. Baum*, 26 Ind. 70.

 Servant when acting within the Scope of his Employment.

startling to even the superficial thinker. If we are to assume that a corporation can do no wrong, then it would seem to be useless to discuss whether the wrongs of its agents can be imputed to it.

In *Parker v. Erie Railroad Company*,¹ a conductor upon one of the defendant's trains took up the tickets of the plaintiff and his wife, telling them that the train did not generally stop at their destination, but that on that occasion it probably would do so, to take in water. The train did not stop as conjectured, and after it had gone by the plaintiff's destination the conductor came into the car where the plaintiff and his wife were and used abusive language to him. The court held that while so doing he was not in the performance of his duties, and therefore the corporation could not be held liable; saying at the same time that if the words had been uttered in the first instance while the conductor was taking the tickets, the decision would have been otherwise. This distinction appears to be entirely destitute of force. In a Kentucky case,² the clerk of the defendant's steamboat was collecting fares from deck-passengers. The plaintiff had just paid his fare, when the clerk charged him with having hidden in order to evade payment, and immediately afterwards assaulted him, putting out one of his eyes. The defendant was held to be responsible for this conduct, the court saying in regard to the "scope of employment:" "It must be borne in mind that from the moment the contract between the carrier and passenger begins, until it ends, the official actions of the officers of the boat, touching the payment of passage-money, or the manner in which the passengers shall conduct themselves, or the enforcement of the regulations prescribed for the government of the vessel, — in short, all intercourse between the officers and passenger naturally and legitimately growing out of the relationship existing between them, — may properly be said to come within the course of their employment, and their actions in the premises, if legal and proper, are within the scope of their authority."³

Other New York cases, decided before and since the decision of the Court of Appeals in *Isaacs v. Third Avenue Railroad Company*,⁴ and that of the Supreme Court in *Parker v. Erie Railroad Company*,⁵ are plainly irreconcilable with these cases.⁶ A labored effort was made by the court, in a subsequent case,⁷ to distinguish the case of *Isaacs v. Third Avenue Railroad Company*. A contrary conclusion, however, was reached upon identical facts. The latest decisions of the Court of Appeals are quite satisfactory upon the liability of the master for the tortious acts of his servant. *Rounds v. Delaware, etc. Railroad Company*⁸ will probably be hereafter regarded as a leading case upon this subject. The plaintiff in this case, a boy twelve years of age, jumped upon the platform of a baggage-car on the defendants' road, intending to ride to a place where the cars were being backed to make up a train. The defendants' rules forbade all persons, except certain employees, riding on baggage-cars, and directed baggagemen to rigidly enforce the rule. As the plaintiff's evidence tended to show, the defendants' baggageman ordered him off while the car was in motion. Wood was

¹ 5 Hun, 57.

² *Sherley v. Billings*, 8 Bush, 147.

³ *Id.* 153.

⁴ *Supra*.

⁵ *Supra*.

⁶ *Sandford v. Eighth Avenue R. Co.*, 23 N. Y. 343; *Higgins v. Watervliet Turnpike Co.*,

46 N. Y. 23; *Jackson v. Second Avenue R. Co.*, 47 N. Y. 274; *Meyer v. Second Avenue R. Co.*, 8 Bosw. 305; *Weed v. Panama R. Co.*, 17 N. Y. 362.

⁷ *Shea v. Sixth Avenue R. Co.*, 62 N. Y. 180.

⁸ 64 N. Y. 129; s. c. 3 Hun, 329.

Notes.

piled along the track for a distance of over one hundred feet, and it was at this place that the plaintiff was ordered to get off. The plaintiff replied to this demand, "I can't, — the wood is right here; I want you to help me," and thereupon the baggageman kicked him off. The plaintiff fell against the wood and rolled back under the car, the wheel of which passed over and crushed his leg. The defendants were held liable for this injury. ANDREWS, J., stated the law to be as follows: —

"It is, in general, sufficient to make the master responsible that he gave to the servant an authority or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master, in that case, will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another."¹ These views were reiterated in a subsequent case.²

It will be noticed that in the case in which the above language was used the plaintiff was a trespasser, but this circumstance did not prevent a recovery. If the law is such in regard to the conduct of a carrier's employees towards strangers and trespassers, it would seem clear, upon principle, that the measure of responsibility of the master for the tortious conduct of his servant towards those whom he has contracted to protect must be judged by a higher standard even, and therefore ought to include a liability for assaults of every description upon passengers.

There is an *obiter dictum* in a Missouri case³ indicating an adherence to the same objectionable views enunciated in the New York case we have noticed. The court said in this case: "If the conduct of this driver were wilful and malicious, with intent to injure the plaintiff, he might be liable to indictment for assault with intent to kill, or some other criminal offence; but his employer was not responsible for his crimes, nor liable for his acts of wilful and malicious trespass. The company was answerable only for his negligence, or his incapacity or unskilfulness in the performance of the duties assigned to him."⁴

¹ 64 N. Y. 134.

² *Cohen v. Dry Dock etc. R. Co.*, 69 N. Y. 170; *s. c.* 8 Jones & S. p. 368.

³ *McKeon v. Citizens' R. Co.*, 42 Mo. 79. See also *Evansville etc. R. Co. v. Baum*, 26 Ind. 70; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Priest v. Hudson etc. R. Co.*, 40 How. Pr. 456.

⁴ 42 Mo. 88. The case of *Malecek v. Tower Grove etc. R. Co.*, 57 Mo. 17, would seem to have been decided on a principle quite the reverse of the above. Compare also the language of *Ryan, C. J.*, in *Craker v. Chicago*

etc. R. Co., 36 Wis. 657, 669: "It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another, and appoint an agent to furnish it, and the agent, of malice, furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it."

 Servant when acting within the Scope of his Employment.

It is sometimes stated that "when the servant acts within the scope of his employment, and is engaged in the business of the corporation, — in other words, doing what he is employed to do, — and violates the rights of a passenger, there is no valid reason why the corporation should not be held responsible for his acts, simply because such servant acted wilfully, wantonly, or maliciously in the commission of the act."¹ This would seem to be undoubtedly good law, as it is consonant with the well-recognized principle that, even as between the principal and the community at large, a master will be responsible for the unlawful manner in which the servant executes his master's business.² Furthermore, it is entirely in harmony with the position towards which authorities of late seem to tend, — that the carrier is responsible for the wilful, wanton, or malicious conduct of his servant towards a passenger, whether acting in the scope of his employment or not.³

The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of passengers as well as of the subordinate servants of the corporation, and the collection of fares. To him is intrusted the discretion to be exercised in the ejection of passengers and others.⁴ In *Thorpe v. New York, etc. Railroad Company*,⁵ the defendant entered into a contract with a proprietor of drawing-room cars, by which the latter agreed to place upon the defendant's road certain drawing-room cars at his own expense, and keep the interiors thereof in good order, the conductors and porters of the same being paid by the proprietor of the cars, but carried by the defendant free of expense. The defendant's conductors had the right to enter the car for any purpose connected with the management of the train, for the collection of fares, and to the assistance of the conductors and porters of these cars in enforcing good order, but for no other purpose. In consideration of the hauling and making of certain repairs on such cars, the defendant received twenty per cent of the gross receipts from them. In an action by the plaintiff against the defendant for an alleged wrongful removal from the drawing-room car by the porter of the same, it was held that the defendant was liable for any injuries sustained by him.⁶ In *Bayley v. Manchester, etc. Railway Company*,⁷ it was held that a principal who puts his servant in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances which arise, when an act of that class is to be done, and trusts him for the manner in which it is to be done; consequently he is answerable for the wrong of the person so intrusted, either in the manner of doing such an act, or in doing it under circumstances which do not justify it,

¹ *Quigley v. Central Pacific R. Co.*, 11 Nev. 350, 363; *Atlantic etc. R. Co. v. Dunn*, 19 Ohio St. 162; *Passenger R. Co. v. Young*, 21 Ohio St. 518; *Indianapolis etc. R. Co. v. Anthony*, 43 Ind. 183; *Jeffersonville etc. R. Co. v. Rogers*, 38 Ind. 116; *Hewett v. Swift*, 3 Allen, 420; *Pittsburgh etc. R. Co. v. Slusser*, 19 Ohio St. 157; *New Orleans etc. R. Co. v. Hurst*, 36 Miss. 660; *McKinley v. Chicago etc. R. Co.*, 44 Iowa, 314; *Pittsburgh etc. R. Co. v. Theobald*, 51 Ind. 246.

² 2 Thomp. on Neg., p. 834.

³ *Pendleton v. Kinsley*, 3 Cliff. 316, *ante*,

p. 352; *Craker v. Chicago etc. R. Co.*, 36 Wis. 657; *Bryant v. Rich*, 106 Mass. 180; *Sherley v. Billings*, 8 Bush, 147; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202.

⁴ *Indianapolis etc. R. Co. v. Anthony*, 43 Ind. 183; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; *O'Brien v. Boston etc. R. Co.*, *ante*, p. 22; *Travers v. Kansas etc. R. Co.*, 63 Mo. 421; *Baltimore etc. R. Co. v. Blocher*, 27 Md. 277; *Brown v. Hannibal etc. R. Co.*, 66 Mo. 583.

⁵ See also *Kinsley v. Lake Shore etc. R. Co.*, 125 Mass. 54.

⁷ L. R. 7 C. P. 415.

Notes.

provided the act was not one of caprice on the part of the servant, but in the course of the employment. The facts of the case were that the plaintiff, a passenger on the defendants' line of railroad, was violently pulled out of a railway-coach by one of the defendants' porters, who acted under a mistaken impression that the plaintiff was in the wrong coach. It was held that, although the porter was not expressly authorized to remove any person in the wrong coach, yet such an act was properly within the scope of his employment, and for the wrongful exercise of which the company were responsible.¹ Similarly, a person employed by a railroad company to clean their cars at the terminus of the line, and to keep persons out of the same while in the discharge of that duty, was held to be acting within the scope of his employment, and the company accordingly liable for the injury which ensued, when, for the purpose of excluding a boy who had got upon the steps of a car while in motion, he kicked the boy's hand, which was grasped about a railing, thereby loosening his hold and causing him to fall between the cars, whereby he was killed.² In *Indianapolis, etc. Railroad Company v. Anthony*,³ it was held that an act of the servant may be within the scope of his employment although unnecessary to the performance of the master's service and not intended for that purpose. The case of *Malecek v. Tower Grove, etc. Railroad Company*⁴ shows conduct on the part of the servant which would probably have been considered not within the scope of his employment but for the subsequent ratification of the servant's acts by the company employing him. The facts of this case are almost identical with those in *Goddard v. Grand Trunk, etc. Railway Company*.⁵ In *Drew v. Sixth Avenue Railroad Company*, it was held that the driver of a street car, in assisting passengers to get on board, acts in the course of his employment, and makes the principal liable for negligence in so doing.⁶ In *Little Miami, etc. Railroad Company v. Wetmore*,⁷ the facts were that the plaintiff, after purchasing a ticket as a passenger, applied to the defendant's baggageman to have his baggage checked to his destination, and by his importunate conduct and abusive language provoked a quarrel, in which, to gratify his personal resentment, the servant struck the plaintiff with a hatchet. It was held that this wrongful act could not be regarded as done in the execution of the service for which he was engaged.⁸ It was held in the Exchequer Chamber that the fact that a passenger in an omnibus is struck by the driver's whip is *prima facie* evidence of negligence by the driver in the course of his employment; and even if it appears that the blow was struck at the employee of another omnibus line, with whom there had been a dispute, and who had jumped on the omnibus step, it is a question for the jury whether the blow was struck by the driver in private spite or in supposed furtherance of his employer's interests.⁹

¹ This decision was afterwards affirmed in the Exchequer Chamber. L. R. 8 C. P. 148. See also *Peck v. New York etc. R. Co.*, 70 N. Y. 587; s. c. 6 Thomp. & C. 436; *McKinley v. Chicago etc. R. Co.*, 44 Iowa, 314.

² *Northwestern R. Co. v. Hack*, 66 Ill. 238. See also *Healey v. City Passenger R. Co.*, 23 Ohio St. 23; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365; *Holmes v. Wakefield*, 12 Allen, 580; *Hewett v. Swift*, 3 Allen, 420.

³ 43 Ind. 183. ⁴ 57 Mo. 18. ⁵ *Supra*, § 1.

⁶ 26 N. Y. 49.

⁷ 19 Ohio St. 110.

⁸ In *McClenaghan v. Brock*, 5 Rich. L. 17,

the owner of a steamboat carrying a slave as a passenger was held to be not liable for an injury done to the slave by the accidental discharge of a gun in the hands of a free negro who was employed as a servant on the boat, the free negro and the slave being at the time of the accident on board a lighter alongside the boat, the former being at that time engaged in no occupation pertaining to his employment.

⁹ *Ward v. General Omnibus Co.*, 42 L. J. (C. P.) 265; s. c. 28 L. T. (N. S.) 850 (affirming 21 Week. Rep. 358; 27 L. T. (N. S.) 761).

 Authority of Servant to make Arrests.

The plaintiff, while travelling in a buggy, was stopped by a blockade of vehicles, the rear of his buggy resting across the defendant's street-car track. While in this position and unable to extricate himself, the defendant's street car came up and the plaintiff was ordered to get off the track. The plaintiff explained his inability to do so, but the driver of the car, with an exhibition of passion and threats of injury, drove his team on and upset the plaintiff's buggy. In an action for damages, it was held that the facts of the case did not warrant a finding, as a matter of law, that the act of the car-driver was with a view to injure the plaintiff, and not to execute his master's business.¹ In *Limpus v. London General Omnibus Company*,² the driver of the defendants' omnibus drove it across the road in front of a rival omnibus belonging to the plaintiff, which was thereby overturned. In an action against the defendants, the driver of the omnibus stated that he pulled across the plaintiff's omnibus to prevent it passing him. The defendants had given instructions to their driver not to obstruct any omnibus. The jury were instructed that if they believed that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, acted recklessly, wantonly, and improperly, but in the course of the service and employment, and doing that which he believed to be for the interest, of the defendants, they were responsible; that if the act of the defendants' driver, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible; that the instructions given to the defendants' driver were immaterial if he did not pursue them; but if the act of the defendants' servant was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible. This direction was held to be right.

§ 3. *Authority of Servants of Carrier to make Arrests.* — It has been decided in this country and in England, that, in the absence of authority in the by-laws of a railroad company, and directions to the servants to execute such by-laws, the arrests which employees of a company happen to make while engaged in their duties cannot be considered as acts within the scope of their employment, and therefore, in case the arrest is unjustifiable, no resort can be had to the company for damages.³

In *Edwards v. London, etc. Railway Company*,⁴ the question was decided for the first time. The facts were that the foreman-porter of the defendant's railway, who, in the absence of the station-master, was in charge of the station, gave into custody the plaintiff, whom he suspected to be stealing the company's property. Having been acquitted of this charge, he brought suit against the

¹ *Cohen v. Dry Dock etc. R. Co.*, 69 N. Y. 170. Compare *Whitaker v. Eighth Avenue R. Co.*, 51 N. Y. 295.

² 1 Hurl. & Colt. 526.

³ In *Porter v. Chicago etc. R. Co.*, 41 Iowa, 358, the employees of a railway company saw obstructions upon the track, and the plaintiff running from the place. The train was stopped, and the plaintiff pursued and taken into custody. On examination before

a Commissioner of the United States, he was discharged, for the reason that sufficient evidence was not adduced to hold him. In an action against the company for this arrest and assault, it was held that, in the absence of any other authority from the company than that to be implied from the mere relation of employer and employee, the company was not liable for the act. See also *Mali v. Lord*, 39 N. Y. 381. ⁴ L. R. 5 C. P. 445.

Notes.

company for the arrest. In regard to this suit, KEATING, J., said: "There is no evidence in the case of anything like express authority being given by the defendants to Holmes, [the foreman] and if there is any evidence to fix the defendants, it must be upon an implied authority resulting from Holmes's position as their servant; and that raises broadly the question whether a person in the position of Holmes has implied authority to give into custody any one whom he suspects to have stolen his master's goods. I think there is no such implied authority. It is admitted that the point is new, and that there is no case in which such an authority has been assumed to exist. The cases that have been referred to in support of the contention are cases where a company has made by-laws, and an act of Parliament has given authority to the company's servants to apprehend persons committing offences against the by-laws. It has been held that, under such circumstances, the servant may be considered to have authority to enforce the by-laws, and to do whatever is necessary for that purpose. That is the limit to which the cases have gone; and it seems to me that it would be carrying the doctrine much further to hold that the defendants were liable in this case. There seems no ground for saying that what was done was in the ordinary course of business of the company, nor that it was for their benefit, except in so far that it is for the benefit of all the queen's subjects that a criminal should be convicted. If Holmes acted from a sense of the duty which rests on every one to give in charge a person whom he thinks is committing a felony, his conduct would in no way be connected with the defendants."¹

The foregoing decision was subsequently reviewed and its authority affirmed in *Allen v. London, etc. Railway Company*,² in which it was held that a clerk of a railway company, whose duty it is to issue tickets to passengers and receive money, in the absence of express authority has no implied authority from the company to give into custody a person whom he suspects to have attempted to rob the company's money-drawer, after the attempt has ceased.³

The matter of arrests for non-payment of fare is regulated by statute in England.⁴ Prior to the passage of the Companies Clauses Consolidation Act,

¹ L. R. 5 C. P. 448.

² L. R. 6 Q. B. 65.

³ Lord Blackburn was inclined to think that if robbery was going on, and could not be prevented except by giving the robbers into custody, or if the clerk had reason to believe that money had actually been stolen, and he could get it back by taking the thief into custody, and did so for that purpose, that might be within the authority of the person in charge of the money-drawer. On this point see *Van Den Eynde v. Ulster R. Co.*, Irish Rep. 5 C. L. 6.

⁴ Companies Clauses Consolidation Act, 8 Vict., c. 20, § 103. See this section set out at length in the previous chapter, § 2.

"§ 104. If any person be discovered, either in or after committing, or attempting to commit, any such offence as in the preceding enactment mentioned, all officers and servants and other persons on behalf

of the company or such other company or party as aforesaid, and all constables, gaolers, and peace-officers, may lawfully apprehend and detain such person until he can conveniently be taken before some justice, or until he be otherwise discharged by due course of law.

"§ 154. It shall be lawful for any officer or agent of the company, and all persons called by him to his assistance, to seize and detain any person who shall have committed any offence against the provisions of this or the special act, and whose name and residence shall be unknown to such officer or agent, and convey him with all convenient dispatch before some justice, without any warrant or other authority than this or the special act; and such justice shall proceed with all convenient dispatch to the hearing and determining of the complaint against such offender."

 Servant using Excessive Force.

provisions in regard to the arrest of passengers, similar to those of the general act, were embraced in private acts incorporating railway companies.¹ By-laws framed under the provisions of the statute have for their primary object the protection of the company's interests; and, therefore, when the company leave a servant in charge of a station, he has implied authority to decide whether the by-law shall be enforced.² But if the servant, in making an arrest, exceeds the powers granted to the company itself in this particular, the act will be regarded as beyond the scope of his employment, and the company will not be liable. Thus, in *Poulton v. London, etc. Railway Company*,³ the plaintiff, having taken a horse by the defendants' railway to an agricultural show, was entitled, under arrangements advertised by the defendants, to take the horse back free of charge, on the production of a certificate. The plaintiff accordingly produced such certificate, and the horse was put into a box. The plaintiff took a ticket for himself, and proceeded by the same train. At the end of the journey the station-master demanded payment for the horse, which the plaintiff refusing to pay, he was detained in custody by two policemen, under the orders of the station-master, until it was ascertained by telegraph that all was right. In an action for this assault and imprisonment, it was held that though a railway company had power to apprehend a person for not paying his own fare, yet in regard to goods it had power only to detain them for non-payment of freight; consequently, as the defendants themselves would have had no power to detain the plaintiff on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority implied from them to the station-master to detain the plaintiff on this assumption, and they were therefore not liable for this act of the station-master.

In *Walker v. South-Eastern Railway Company*,⁴ it was held that if the servant acts contrary to the regulations of the company in making an arrest, the conduct of the servant cannot be imputed to the company and it will not be responsible; therefore, where the regulations of the company and instructions to its constables authorized the arrest of any one whom they might see committing an assault, for the purpose of putting an end to the affray, but prohibited arrests after the affray was at an end, the company was not chargeable with the act of one of its constables in wrongfully arresting the plaintiff after a scuffle had ended.⁵

§ 4. Use of Excessive Force by the Servant in the Execution of the Carrier's Business. — It is a familiar rule that the master is responsible *civilliter* for

¹ *Chilton v. London etc. R. Co.*, 16 Mee. & W. 212.

² *Goff v. Great Northern R. Co.*, 3 El. & El. 672; s. c. 30 L. J. (Q. B.) 148; *Moore v. Metropolitan R. Co.*, L. R. 8 Q. B. 36; s. c. 42 L. J. (Q. B.) 23. *Contra*, it would seem, are the earlier cases of *Eastern Counties R. Co. v. Broom*, 6 Exch. 314, and *Roe v. Birkenhead etc. R. Co.*, 7 Exch. 36, referred to disparagingly in *Goff v. Great Northern R. Co.*, *supra*, and very unsatisfactorily distinguished from the facts in that case.

³ L. R. 2 Q. B. 534.

⁴ L. R. 5 C. P. 640; s. c. 39 L. J. (C. P.) 346.

⁵ The principles of the above decisions would seem to be at variance with the general application of the rule of *respondet superior*. It is familiar law that a master may be held responsible for his servant's conduct, though he acts contrary to his orders, or uses excessive force, or performs his duties in a spirit of wantonness. *Phila. etc. R. Co. v. Derby*, *ante*, p. 31; *Seymour v. Greenwood*, 7 Hurl. & N. 355 (affirming s. c. 6 Hurl. & N. 359); *Limpus v. General Omnibus Co.*, 1 Hurl. & Colt. 426.

Notes.

the wrongful act of the servant causing injury to a third person, whether the act was one of negligence or positive misfeasance, provided the servant was at the time acting for the master, and within the scope of the business intrusted to him;¹ and that, too, although the servant in doing it departed from the instructions of his master.² The foregoing rule is of general application, and is true whether the person suffering from such wrongful act of the servant is one to whom the carrier owes a duty of protection, or a member of the community at large, or a trespasser. Therefore, the rule is general that when a master has intrusted to his servant the performance of a duty, he will be liable as principal for the use of excessive force in the performance of that duty. The act of the servant is considered not the less authorized because the authority conferred has been abused. Thus, in *Ramsden v. Boston, etc. Railroad Company*,³ a railroad company was held responsible for an assault by the conductor of one of its trains, in seizing, or attempting to seize, the property of a passenger in payment of his fare; and in *Passenger Railroad Company v. Young*,⁴ for violently and unreasonably expelling the plaintiff and his wife from a car of the defendant's street railroad.

A passenger who is lawfully upon a railroad train and has paid his fare has the right to offer such resistance to an attempt on the part of the conductor to remove him, especially when the train is in motion, as may be necessary to prevent his being ejected; and if, in consequence of such resistance, extraordinary force becomes necessary and is used to remove him, and he is injured thereby, he can recover of the corporation for such injury.⁵ In *Peck v. New York, etc. Railroad Company*,⁶ a railroad corporation was held responsible for the use of excessive force by an employee in resisting the efforts of the plaintiff to enter the ladies' car contrary to regulations which it was admitted the defendant had a right to establish and enforce.

In *Seymour v. Greenwood*,⁷ the Court of Exchequer Chamber held that the carrier was liable for an injury caused by the needlessly violent expulsion from an omnibus of a person who was drunk, who had refused to pay his fare, and had assaulted the guard; and in *Sanford v. Eighth Avenue Railroad Company*,⁸ the action was brought for damages resulting from the death of the plaintiff's intestate by his being thrown from a car of the defendant by the conductor while the car was in motion. The deceased refused to pay his fare, and for that reason

¹ *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23; *Rounds v. Delaware etc. R. Co.*, 64 N. Y. 129; *Cohen v. Dry Dock etc. R. Co.*, 69 N. Y. 170; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365; *Sandford v. Eighth Avenue R. Co.*, 23 N. Y. 343; *Jackson v. Second Avenue R. Co.*, 47 N. Y. 274; *Lovett v. Salem etc. R. Co.*, 9 Allen, 557; *Holmes v. Wakefield*, 12 Allen, 581; *Moore v. Fitchburg R. Co.*, 4 Gray, 465; *New Orleans etc. R. Co. v. Bailey*, 40 Miss. 453; *Ramsden v. Boston etc. R. Co.*, 104 Mass. 117; *Williamson v. Grand Trunk R. Co.*, 17 Upper Canada C. P. 615.

² *Higgins v. Watervliet Turnpike Co.*, *supra*; *Phila. etc. R. Co. v. Derby*, 14 How. 468; s. c. *ante*, p. 31.

³ 104 Mass. 117.

⁴ 21 Ohio St. 518. See also *Turner v. North Beach etc. R. Co.*, 34 Cal. 594.

⁵ *English v. Delaware etc. Canal Co.*, 66 N. Y. 454; s. c. 4 Hun, 683. See also *Sanford v. Eighth Avenue R. Co.*, 23 N. Y. 343.

⁶ 70 N. Y. 587; s. c. 6 Thomp. & C. 436. See also *Bayley v. Manchester etc. R. Co.*, L. R. 7 C. P. 415 (affirmed in Exchequer Chamber, L. R. 8 C. P. 148); *McKinley v. Chicago etc. R. Co.*, 44 Iowa, 314.

⁷ 7 Hurl. & N. 355; s. c. 30 L. J. (Exch.) 327; 9 Week. Rep. 785; 4 L. T. (N. S.) 833, (affirming s. c. 6 Hurl. & N. 359; 30 L. J. (Exch.) 189; 7 Week. Rep. 785.)

⁸ 23 N. Y. 343.

Circumstances justifying Expulsion of Passenger.

the conductor ejected him. The court held that the conduct of the intestate justified the conductor in expelling him from the car in a proper manner, but not when the car was in motion. COMSTOCK, C. J., said:¹ "The case is therefore to be stated thus: The defendants, by their servant, were guilty of a personal and intentional assault upon the intestate. That assault, as we think, was not in law justified by the facts, and they are consequently without a legal defence."²

In *Rounds v. Delaware, etc. Railroad Company*,³ the court said:⁴ "The fact that the plaintiff was a trespasser on the cars is not a defence. The lad did not forfeit his life or subject himself to the loss of his limbs because he was wrongfully on the car. The defendant owed him no duty of care by reason of any special relation assumed or existing between the company and him, but he was entitled to be protected against unnecessary injury by the defendant or its servants in exercising the right of removing him, and especially from the unnecessary and unjustifiable act of the brakeman, by which his life was put in peril and which resulted in his losing his limb."⁵

§ 5. *Résumé of the Circumstances justifying Ejection of Passenger.* — A great variety of circumstances will have this effect. The conduct of the passenger may be in violation of lawful police regulations;⁶ or he may be a person known to be of a disreputable and vicious character, and therefore disentitled to demand transportation.⁷ The passenger may refuse to exhibit or deliver up his ticket when properly requested;⁸ or insist that he shall ride upon an improper

¹ *Id.* 346.

² If the assistants employed by a conductor of a railroad train strike a passenger unjustifiably in expelling him, the corporation is liable, although the blows were struck against the conductor's order. *Coleman v. New York etc. R. Co.*, 106 Mass. 160.

³ 64 N. Y. 129.

⁴ *Id.* 138.

⁵ See also *Healey v. City Passenger R. Co.*, 28 Ohio St. 23; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365; *Holmes v. Wakefield*, 12 Allen, 580; *The State v. Ross*, 26 N. J. L. 226; *Hewett v. Swift*, 3 Allen, 420; *North-Western R. Co. v. Hack*, 66 Ill. 238. The case of *Kline v. Central Pacific R. Co.*, 37 Cal. 400 (s. c. 39 Cal. 587), exhibits a state of facts almost identical with that of *Rounds v. Delaware etc. R. Co.* In this case it was held that proof that the conductor ordered the plaintiff to get off the train while in motion, and accompanied such order with a demonstration of force sufficient to impress him with the belief that it would be employed, and thereby compelled him to jump from the car, is equivalent to proof of the employment of actual force. See also *Brown v. Hannibal etc. R. Co.*, 66 Mo. 588; *Lovett v. Salem etc. R. Co.*, 9 Allen, 557. But in cases of this kind it is necessary to establish the fact that the person committing the assault is a servant of the company. The mere fact that he declares himself to

be such at the time of the assault, does not of itself establish it. *Lindsay v. Central R. etc. Co.*, 46 Ga. 447.

⁶ *Vinton v. Middlesex R. Co.*, 11 Allen, 304; *Pittsburgh etc. R. Co. v. Valleley*, 32 Ohio St. 345; s. c. 6 Cent. L. J. 277; *Marquette v. Chicago etc. R. Co.*, 33 Iowa, 562; *Murphy v. Union etc. R. Co.*, 118 Mass. 228; *Chicago etc. R. Co. v. Griffin*, 68 Ill. 499; *Pittsburgh etc. R. Co. v. Van Houten*, 48 Ind. 90; *Pittsburgh etc. R. Co. v. Vandyne*, 57 Ind. 576; *The State v. Ross*, 26 N. J. L. 224; *Higgins v. Watervliet etc. R. Co.*, 46 N. Y. 23.

⁷ *Thurston v. Union Pacific R. Co.*, ante, p. 10. But see *Coppin v. Braithwaite*, 8 Jur. 875, per Rolfe, B.

⁸ *The People v. Caryl*, 3 Park. Cr. Cas. 326; *Baltimore etc. R. Co. v. Blocher*, 27 Md. 277; *Hibbard v. New York etc. R. Co.*, 15 N. Y. 455; *The State v. Campbell*, 32 N. J. L. 309; *Vedder v. Fellowes*, 20 N. Y. 126; *Northern R. Co. v. Page*, 22 Barb. 130; *Illinois etc. R. Co. v. Whittemore*, 43 Ill. 420. An unreasonable demand for the delivery of a ticket, and expulsion in consequence of refusal, on the other hand, affords a good cause of action to the passenger. *The State v. Thompson*, 20 N. H. 251; *Pittsburgh etc. R. Co. v. Henrich*, 39 Ind. 509; *Maples v. New York etc. R. Co.*, 38 Conn. 557; *Curtis v. Grand Trunk etc. R. Co.*, 12 Upper Canada C. P. 89; *Indianapolis etc. R. Co. v. Milligan*, 50 Ind. 392.

Notes.

ticket,¹ or a ticket the limitation of which has expired,² or a ticket for which the company have received no consideration or has been otherwise unlawfully obtained,³ or without any ticket whatever,⁴ or without paying any fare whatever,⁵ or the fare which may properly be demanded;⁶ or be guilty of a breach of other reasonable regulations of the carrier;⁷ or his conduct may amount to a breach

¹ *Frederick v. Marquette etc. R. Co.*, 37 Mich. 342; *s. c.* 6 Reporter, 116; *Pullman Palace-Car Co. v. Reed*, 75 Ill. 125; *Jerome v. Smith*, 48 Vt. 230; *Chicago etc. R. Co. v. Griffin*, 68 Ill. 499; *Goetz v. Hannibal etc. R. Co.*, 50 Mo. 572; *Nolan v. New York etc. R. Co.*, 9 Jones & Sp. 541; *Barker v. New York etc. R. Co.*, 24 N. Y. 599; *s. c. sub nom.* *Page v. New York etc. R. Co.*, 6 Duer, 523; *Keeley v. Boston etc. R. Co.*, 67 Me. 163; *s. c.* 6 Cent. L. J. 382; 17 Alb. L. J. 366; *O'Brien v. Boston etc. R. Co.*, *ante*, p. 22; *Terre Haute etc. R. Co. v. Vanatta*, 21 Ill. 188; *Bennett v. New York etc. R. Co.*, 69 N. Y. 594; *s. c.* 5 Hun, 599.

² *Hill v. Syracuse etc. R. Co.*, 63 N. Y. 101; *Farewell v. Grand Trunk etc. R. Co.*, 15 Upper Canada Q. B. 427; *Elmore v. Sands*, 54 N. Y. 512; *Barker v. Coffin*, 31 Barb. 556; *Boice v. Hudson etc. R. Co.*, 61 Barb. 611; *Boston etc. R. Co. v. Proctor*, 1 Allen, 267; *Shedd v. Troy etc. R. Co.*, 40 Vt. 88; *The State v. Campbell*, 32 N. J. L. 309; *Wentz v. Erie R. Co.*, 5 Thomp. & C. 556; *s. c.* 3 Hun, 241; *Nelson v. Long Island R. Co.*, 7 Hun, 140; *Briggs v. Grand Trunk R. Co.*, 24 Upper Canada Q. B. 510; *Powell v. Pittsburgh etc. R. Co.*, 25 Ohio St. 70; *Sherman v. Chicago etc. R. Co.*, 40 Iowa, 45; *Lillis v. St. Louis etc. R. Co.*, 64 Mo. 464; *Terre Haute etc. R. Co. v. Fitzgerald*, 47 Ind. 79.

³ *Memphis etc. R. Co. v. Chastine*, 54 Miss. 503. In this case the ticket was purchased with counterfeit money. In *McCarthy v. Chicago etc. R. Co.*, 41 Iowa, 432, the plaintiff had not procured a ticket previous to entering the train, but handed the conductor a ten-dollar bill to pay his fare of \$6.20. In making the change, the conductor returned to him \$5 too much. The plaintiff refused to examine his change to ascertain if the conductor's claim of mistake was correct. When he had ridden as far as \$1.20 entitled him to ride, he was directed to leave the train, and did so. It was held, that, having the means at hand to determine whether or not the mistake had been made, and failing to use them, he was not entitled to damages for expulsion from the train.

A railroad-pass fraudulently obtained confers no rights upon the holder. *Brown v. Missouri etc. R. Co.*, 64 Mo. 536. Such a pass

may be revoked at pleasure. *Turner v. Richmond etc. R. Co.*, 70 N. C. 1.

In *Davis v. Great Western R. Co.*, 20 Upper Canada Q. B. 27, it appeared that the ticket offered by the plaintiff to the conductor must have been sold about sixteen months previous, and on another occasion the same plaintiff had presented an old ticket, and on its being rejected had paid his fare. These circumstances were held to be calculated to excite suspicion; therefore the mere production of the ticket was not sufficient to establish the plaintiff's right to passage, but it was a question for the jury whether the plaintiff had procured it fairly or was attempting an imposition.

⁴ *Weaver v. Rome etc. R. Co.*, 3 Thomp. & C. 270; *Shelton v. Lake Shore etc. R. Co.*, 29 Ohio St. 214; *Pullman Palace-Car Co. v. Reed*, 75 Ill. 125; *Willets v. Buffalo etc. R. Co.*, 14 Barb. 585; *Wakefield v. South Boston R. Co.*, 117 Mass. 544; *Townsend v. New York etc. R. Co.*, 56 N. Y. 295; *Duke v. Great Western R. Co.*, 14 Upper Canada Q. B. 377; *Crawford v. Cincinnati etc. R. Co.*, 26 Ohio St. 580.

⁵ *Chicago etc. R. Co. v. Roberts*, 40 Ill. 503; *Chicago etc. R. Co. v. Peacock*, 48 Ill. 253; *Chicago etc. R. Co. v. Boger*, 1 Bradw. 472; *Ohio etc. R. Co. v. Muhling*, 30 Ill. 9; *Haley v. Chicago etc. R. Co.*, 21 Iowa, 15; *Great Western R. Co. v. Miller*, 19 Mich. 305; *The People v. Jillson*, 3 Park. Cr. Cas. 234; *Fulton v. Grand Trunk R. Co.*, 17 Upper Canada Q. B. 428.

⁶ *Regina v. Fanenf*, 5 Lower Canada Jur. 167; *St. Louis etc. R. Co. v. Dalby*, 19 Ill. 353; *Chicago etc. R. Co. v. Parks*, *ante*, p. 319; *St. Louis etc. R. Co. v. South*, 43 Ill. 176; *Crocker v. New London etc. R. Co.*, 24 Conn. 249; *Porter v. New York etc. R. Co.*, 34 Barb. 353; *Bordeaux v. Erie R. Co.*, 8 Hun, 579; *The State v. Chovin*, 7 Iowa, 204; *Du Laurans v. St. Paul etc. R. Co.*, 15 Minn. 49; *Indianapolis etc. R. Co. v. Rinard*, 46 Ind. 293; *Hilliard v. Goold*, 34 N. H. 230. It required a judicial decision, in California, to establish that an offer to pay the fare demanded, in legal-tender notes of the United States, was a sufficient tender. *Tarbell v. Central Pacific R. Co.*, 34 Cal. 616.

⁷ *Peck v. New York etc. R. Co.*, 70 N. Y. 587; *Bass v. Chicago etc. R. Co.*, 36 Wis. 450; *s. c.*

Circumstances justifying Expulsion of Passenger.

of the contract of carriage.¹ Circumstances like the foregoing furnish common illustrations of what will justify the expulsion of the passenger by the carrier's servants.

§ 6. Where Persons may be ejected from a Railroad Train. — In the absence of a statute regulating this matter, there is no requirement at common law to put out a trespasser at one place rather than another. His convenience is not to be consulted in this matter. But the law never permits one to wantonly expose another to injury.² In England, it is provided by statute that "passengers refusing to pay their fare may, by the conductor of the train and the servants of the company, be, with their baggage, put out of the cars, using no unnecessary force, at any usual stopping-place or near any dwelling-house, as the conductor shall elect, first stopping the train."³ Statutes similar to this are in force in some of the States; it is sometimes provided that a passenger shall be expelled at no other place than a regular station upon the road.⁴ Under a statute which provided that passengers should be expelled from the train only at the "usual stopping-place," it was held that a water-tank, although a usual stopping-place, was not such as was contemplated by this statute, which must be a regular station.⁵ Trespassers — persons going upon the train with the intention of not paying their fare — cannot claim the benefits of a statute of this kind. They are in no sense "passengers." They may be expelled at any place where such expulsion would not result in wanton injury.⁶ A regulation provided that "passengers will not be carried on way-trains unless they are provided with tickets. Way-freights will not stop at stations where tickets are not sold, to receive nor let off passengers." This is reasonable; but a passenger who has ridden on a way-freight train before the making of the rule, and afterwards, without objection for the want of a ticket, cannot be landed off the train a mile from a station, without proof of express notice or actual knowledge of the existence of the rule forbidding any one to enter the cars without a ticket.⁷

39 Wis. 636; 42 Wis. 654; *ante*, p. 311; West Chester R. Co. v. Miles, 55 Pa. St. 209; Goines v. McCandless, 4 Phila. 255; Cully v. Baltimore etc. R. Co., 1 Hughes, 536; Green v. The City of Bridgeton, 9 Cent. L. J. 206; The Commonwealth v. Power, 7 Metc. 596; Jencks v. Coleman, 2 Sumn. 221, *ante*, p. 11; Harris v. Stevens, 31 Vt. 79; Barney v. The D. R. Martin, 11 Blatchf. 233; s. c. 5 Ch. Leg. N. 535; *sub nom.* Barney v. The Oyster Bay etc. Co., 67 N. Y. 301.

¹ Stone v. Chicago etc. R. Co., 47 Iowa, 82; Dietrich v. Pennsylvania R. Co., 71 Pa. St. 432; Hamilton v. New York etc. R. Co., 51 N. Y. 100; Cheney v. Boston etc. R. Co., 11 Metc. 121; Cleveland etc. R. Co. v. Bartram, 11 Ohio St. 457; The State v. Overton, 24 N. J. L. 435; Johnson v. Concord R. Co., 46 N. H. 213; Beebe v. Ayres, 28 Barb. 275; Drew v. Central Pacific R. Co., 51 Cal. 425; Briggs v. Grand Trunk etc. R. Co., 24 Upper Canada Q. B. 510; Craig v. Great Western R. Co., 21

Upper Canada Q. B. 504; Barker v. Coffin, 31 Barb. 556; Gale v. Delaware etc. R. Co., 7 Hun, 670.

² Great Western R. Co. v. Miller, 19 Mich. 305; Haley v. Chicago etc. R. Co., 21 Iowa, 15.

³ Fulton v. Grand Trunk R. Co., 17 Upper Canada Q. B. 428.

⁴ Rev. Stats. Ill. 1877, p. 774, sect. 80; Chicago etc. R. Co. v. Flagg, 43 Ill. 364; Terre Haute etc. R. Co. v. Vanatta, 21 Ill. 188.

⁵ Chicago etc. R. Co. v. Flagg, 43 Ill. 364.

⁶ Lillis v. St. Louis etc. R. Co., 64 Mo. 464; Chicago etc. R. Co. v. Boger, 1 Bradw. 472. The contrary rule, announced in Chicago etc. R. Co. v. Peacock, 48 Ill. 253, and Chicago etc. R. Co. v. Roberts, 40 Ill. 503, would permit a trespasser to ride the length and breadth of the State, suffering only the inconvenience of being gently handed off the train at each station.

⁷ Lake Shore etc. R. Co. v. Greenwood, 79 Pa. St. 373.

CHAPTER XI.

CONTRACTS LIMITING CARRIER'S LIABILITY FOR PERSONAL INJURIES.

LEADING CASE: *Railroad Company v. Lockwood*. — Right of carrier to stipulate against liability.

- NOTES: § 1. Validity of contract limiting liability of carrier to passenger travelling upon a free pass.
2. Drivers' passes.
 3. What negligence is covered by such a release.

RIGHT OF CARRIER TO STIPULATE AGAINST LIABILITY.

RAILROAD COMPANY *v.* LOCKWOOD.*

Supreme Court of the United States, 1873.

HON. NATHAN CLIFFORD,	} <i>Justices.</i>
“ SAMUEL F. MILLER,	
“ STEPHEN J. FIELD,	
“ JOSEPH P. BRADLEY,	
“ NOAH H. SWAYNE,	
“ DAVID DAVIS,	
“ WILLIAM STRONG,	
“ WARD HUNT,	

1. **Stipulation must be just and reasonable.** — A common carrier may not lawfully stipulate against the responsibility which the law imposes upon him, unless such stipulation is just and reasonable.
2. **Cannot stipulate against Negligence.** — It is not just and reasonable for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.
3. **The Application of these Rules.** — These rules are said to apply both to carriers of goods and carriers of passengers, and with special force to the latter.
4. **Effect of Drover's Pass.** — Where a drover travels on a pass given to enable him to take care of cattle which he is shipping on a railroad train, he is a passenger for hire.

THE plaintiff in this case was a drover injured whilst travelling on a stock-train of the New York Central Railroad Company proceeding

* Reported, 17 Wall. 357.

Supreme Court of the United States.

from Buffalo to Albany, and brought this suit to recover damages for the injury. He had cattle in the train, and had been required at Buffalo to sign an agreement to attend to the loading, transporting, and unloading of them, and to take all risk of injury to them and of personal injury to himself or to whomsoever went with the cattle; and he received what is called a drover's pass, — that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, — at least the ordinary negligence of their servants, — and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did. Judgment being entered accordingly, the railroad company took this writ of error.

It is unnecessary to notice some subordinate points made; this court was of opinion that all the questions of fact were fairly left to the jury, and the whole controversy depended on the main question of law stated.

T. R. Strong, for plaintiff in error; *Messrs. Truman Smith and Cephas Brainerd*, *contra*.

Mr. Justice BRADLEY delivered the opinion of the court. — It may be assumed, *in limine*, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is therefore distinctly raised, whether a railroad company carrying passengers for hire can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative

Railroad Company *v.* Lockwood.

interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident, without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, etc., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionately relieving the transportation of produce and merchandise from some of the burdens with which it is loaded.

The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void, — or, at least, null and void under certain circumstances.

In the case of sea-going vessels, Congress has, by the act of 1851, relieved ship-owners from all responsibility for loss by fire, unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of the ship and freight, where losses happen by the embezzlement or other act of the master, crew, or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by State legislatures. This seems to be the only important modification of previously existing law on the subject which, in this country, has been effected by legislative interference. And by this it is seen, that, though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight, for the negligence and misconduct of his employees, and liable without limit for his own negligence.

It is true that the first section of the above act, relating to loss by fire, has a proviso that nothing in the act contained shall prevent the

Supreme Court of the United States.

parties from making such contract as they please, extending or limiting the liability of ship-owners. This proviso, however, neither enacts nor affirms anything. It simply expresses the intent of Congress to leave the right of contracting as it stood before the act.

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common-law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This they were allowed to enforce by means of a notice of non-liability if the disclosure was not made. But such announcements as "All baggage at the risk of the owner," and such exceptions in bills of lading as "This company will not be responsible for injuries by fire, nor for goods lost, stolen, or damaged," were held to be unavailing and void, as being against the policy of the law.¹

But since the decision in the case of *New Jersey Steam Navigation Company v. Merchants' Bank*, by this court, in January term, 1848,² it has been uniformly held, as well in the courts of New York as in the Federal courts, that a common carrier may, by special contract, limit his common-law liability, although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of *New Jersey Navigation Company v. Merchants' Bank*, above adverted to, grew out of the burning of the steamer Lexington. Certain money belonging to the bank had been intrusted to Harnden's Express, to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid so far as to exonerate the steamboat company from the responsibility imposed by law, but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose; and that, inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars, as well as

¹ *Cole v. Goodwin*, 19 Wend. 257; *Gould v. Hill*, 2 Hill, 623.

² 6 How. 344.

Railroad Company v. Lockwood.

in the management of the steamer during the fire, they held them responsible for the loss.

As this has been regarded as a leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case, as in this, the contract was general, exempting the carrier from every risk and imposing it all upon the party; but the court would not presume that the parties intended to include the negligence of the carrier or his agents in that exception.

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence. In doing so we shall first briefly review the course of decisions in New York, on which great stress has been laid, and which are claimed to be decisive of the question. Whilst we cannot concede this, it is nevertheless due to the courts of that State to examine carefully the grounds of their decision, and to give them the weight which they justly deserve. We think it will be found, however, that the weight of opinion, even in New York, is not altogether on the side that favors the right of the carrier to stipulate for exemption from the consequences of his own or his servants' negligence.

The first recorded case that arose in New York, after the before-mentioned decision in this court, involving the right of a carrier to limit his liability, was that of *Dorr v. New Jersey Steam Navigation Company*,¹ decided in 1850. This case also arose out of the burning of the *Lexington*, under a bill of lading which excepted from the company's risk "danger of fire, water, breakage, leakage, and other accidents." Judge Campbell, delivering the opinion of the court, says: "A common carrier has in truth two distinct liabilities: the one for losses by accident or mistake, where he is liable as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. It would certainly seem reasonable that he might, by express special contract, restrict his liability as insurer; that he might

¹ 4 Sandf. S. C. 136.

 Supreme Court of the United States.

protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty. Such we understand to be the doctrine laid down in the case of *New Jersey Steam Navigation Company v. Merchants' Bank*, in 6 Howard, and such we consider to be the law in the present case." And in *Stoddard v. Long Island Railway Company*,¹ another express case, in which it was stipulated that the express company should be alone responsible for all losses, Judge Duer, for the court, says: "Conforming our decision to that of the Supreme Court of the United States, we must therefore hold: 1. That the liability of the defendants as common carriers was restricted by the terms of the special agreement between them and Adams & Co., and that this restriction was valid in law. 2. That by the just interpretation of this agreement, the defendants were not to be exonerated from all losses, but remained liable for such as might result from the wrongful acts, or the want of due care and diligence, of themselves or their agents and servants. 3. That the plaintiffs, claiming through Adams & Co., are bound by the special agreement." The same view was taken in subsequent cases,² all of which show that no idea was then entertained of sanctioning exemptions of liability for negligence.

It was not till 1858, in the case of *Wells v. New York Central Railroad Company*,³ that the Supreme Court was brought to assent to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants. That was the case of a gratuitous passenger travelling on a free ticket which exempted the company from liability. In 1862, the Court of Appeals, by a majority, affirmed this judgment;⁴ and in answer to the suggestion that public policy required that railroad companies should not be exonerated from the duty of carefulness in performing their important and hazardous duties, the court held that the case of free passengers could not seriously affect the incentives to carefulness, because there were very few such, compared with the great mass of the travelling public. *Perkins v. New York Central Railroad Company*⁵ was also the case of a free passenger, with a similar ticket; and the court held that the indorsement exempted the company from all kinds of negligence of its agents, gross as well as ordinary; that there is, in truth, no practical distinction in the degrees of negligence.

¹ 5 Sandf. S. C. 180.

² *Parsons v. Monteath*, 13 Barb. 353; *Moore v. Evans*, 14 Barb. 524.

³ 26 Barb. 641.

⁴ 24 N. Y. 181.

⁵ 24 N. Y. 196.

Railroad Company v. Lockwood.

The next cases of importance that arose in the New York courts were those of *drovers' passes*, in which the passenger took all responsibility of injury to himself and stock. The first was that of *Smith v. New York Central Railroad Company*,¹ decided in March, 1859. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car, which caused it to jump the track. The Supreme Court, by HOGEBROOM, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the judge, "I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part." The judge added that he thought the carrier might, by positive stipulation, relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But to accomplish that object the contract must be clear and specific in its terms, and plainly covering such a case. Of course this remark was extra-judicial. The judgment itself was affirmed by the Court of Appeals in 1862, by a vote of five judges to three.² Judge WRIGHT strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the State; yet the State has a deep interest in protecting the lives of its citizens." He argued that it was a question affecting the public, and not alone the party who is carried. Judge SUTHERLAND agreed in substance with Judge WRIGHT. Two other judges held that if the party injured had been a gratuitous passenger the company would have been discharged, but in their view he was not a gratuitous passenger. One judge was for affirmance on the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants.

In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality it included all risks.

¹ 29 Barb. 132.² 24 N. Y. 222.

Supreme Court of the United States.

The next case, *Bissell v. New York Central Railroad Company*,¹ first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "whether of negligence by their agents or otherwise," for injury to the person or stock of the passenger. The latter was killed by the express-train running into the stock-train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The Supreme Court held that gross negligence (whether of servants or principals) cannot be excused by contract in reference to the carriage of passengers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the Court of Appeals, — four judges against three,² — Judge SMITH, who concurred in the judgment below, having in the meantime changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and therefore that the case was governed by *Wells v. New York Central Railroad Company*; ³ but whether so or not, the contract was founded on a valid consideration, and the passenger was bound to it, even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice SELDEN in favor, and by Justice DENIO against the conclusions reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, — that is, the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is authorized to charge, he must submit to their terms, however onerous. Justice DENIO, with much force of argument, combated this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of *Poucher v. New York Central Railroad Company*⁴ is in all essential respects a similar case to this, and a similar result was reached.

These are the authorities which we are asked to follow. Cases may also be found in some of the other State courts, which, by *dicta* or decision, either favor or follow more or less closely the decisions in New

¹ 29 Barb. 602.² 25 N. Y. 442.³ 24 N. Y. 181; s. c. 26 Barb. 641.⁴ 49 N. Y. 263.

 Railroad Company *v.* Lockwood.

York. A reference to the principal of them is all that is necessary here.¹

A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms; so that if we only felt bound by those precedents, we could perhaps find no authority for reversing the judgment in this case. But on a question of general commercial law, the Federal courts administering justice in New York have equal and coördinate jurisdiction with the courts of that State. And in deciding a case which involves a question of such importance to the whole country, a question on which the courts of New York have expressed such diverse views, and have so recently, and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

In passing, however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Judge DAVIS, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts."²

We now proceed to notice some cases decided in other States, in which a different view of the subject is taken.

In Pennsylvania, it is settled by a long course of decisions that a common carrier cannot, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents.³ "The doctrine is firmly

¹ *Ashmore v. Penn. etc. Transp. Co.*, 28 N. J. L. 180; *Kinney v. Central R. Co.*, 32 N. J. L. 407; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539; *Peck v. Weeks*, 34 Conn. 145; *Lawrence v. New York etc. R. Co.*, 36 Conn. 63; *Kimball v. Rutland etc. R. Co.*, 26 Vt. 247; *Mann v. Birchard*, 40 Vt. 332; *Adams Express Co. v. Haynes*, 42 Ill. 89; *Adams Express Co. v. Perkins*, 42 Ill. 458; *Illinois etc. R. Co. v. Adams*, 42 Ill. 474; *Hawkins v. Great Western R. Co.*, 17 Mich. 57; *s. c.* 18 Mich. 427; *Baltimore etc. R. Co. v. Brady*,

32 Md. 333; *Brehme v. Adams Express Co.* 25 Md. 328; *Levering v. Union Transp. Co.*, 42 Mo. 88.

² *Stinson v. New York etc. R. Co.*, 32 N. Y. 337.

³ *Laing v. Colder*, 8 Pa. St. 479; *Camden etc. R. Co. v. Baldauf*, 16 Pa. St. 67; *Golday v. Pennsylvania R. Co.*, 30 Pa. St. 242; *Powell v. Pennsylvania R. Co.*, 32 Pa. St. 414; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Farnham v. Camden etc. R. Co.*, 55 Pa. St. 53; *Express Co. v. Sands*, 55 Pa. St. 140; *Em-*

Supreme Court of the United States.

settled," says Chief Justice THOMPSON in *Farnham v. Camden and Amboy Railroad Company*, "that a common carrier cannot limit his liability so as to cover his own or his servants' negligence."¹ This liability is affirmed both when the exemption stipulated for is general, covering all risks, and where it specifically includes damages arising from the negligence of the carrier or his servants. In *Pennsylvania Railroad Company v. Henderson*,² a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents or otherwise. The court, Judge READ delivering the opinion, after a careful review of the Pennsylvania decisions, says: "This indorsement relieves the company from all liability, for any cause whatever, for any loss or injury to the person or property, however it may have been occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence."

The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence or that of his servants.³ In *Davidson v. Graham*,⁴ the court, after conceding the right of the carrier to make special contracts to a certain extent, says: "He cannot, however, protect himself from losses occasioned by his own fault. He exercised a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests. * * * And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties." In *Welsh v. Pittsburgh, Fort Wayne, and Chicago Railroad Company*,⁵ the court says: "In this State, at least, railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the State." From these facts the court reasons that it is specially important that railroad companies should be held to the exercise of due diligence at least. And as to the distinction taken by some, that negligence of servants may be stipulated for, the court pertinently says: "This doctrine, when applied to a corporation, which can only act through its agents and servants, would secure complete immunity for the neglect of every duty."⁶ And in relation to a drover's pass, substantially the

pire Transp. Co. v. Wamsutta Oil Co., 63 Pa. St. 14.

¹ 55 Pa. St. 62.

² *Supra*.

³ *Jones v. Voorhees*, 10 Ohio, 145; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Ohio St. 362; *Wilson v. Hamilton*,

4 Ohio St. 722; *Welsh v. Pittsburgh etc. R. Co.*, 10 Ohio St. 75; *Cleveland etc. R. Co. v. Curran*, 19 Ohio St. 1; *Cincinnati etc. R. Co. v. Pontius*, 19 Ohio St. 221; *Knowlton v. Erie R. Co.*, 19 Ohio St. 260.

⁴ *Supra*. ⁵ 10 Ohio St. 75. ⁶ *Id.* 75, 76.

Railroad Company v. Lockwood.

same as that in the present case, the same court, in *Cleveland, etc. Railroad Company v. Curran*,¹ held: 1. That the holder was not a gratuitous passenger; 2. That the contract constituted no defence against the negligence of the company's servants, being against the policy of the law, and void. The court refers to the cases of *Bissell v. New York Central Railroad Company*² and of *Pennsylvania Railroad Company v. Henderson*,³ and expresses its concurrence in the Pennsylvania decision.⁴ This was in December term, 1869.

The Pennsylvania and Ohio decisions differ mainly in this, that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is on him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff.

In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility for loss occasioned by natural causes, such as the weather, fire, heat, frost, etc.,⁵ yet in a case where it was stipulated that a railroad company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owners should take the risk of all such damages, the court held that the company were not thereby excused from the consequences of their negligence, and that the distinction between negligence and gross negligence in such a case is not tenable. "The very great danger," says the court, "to be anticipated by permitting them [common carriers] to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be over-estimated. It would remove the principal safeguard for the preservation of life and property in such conveyances."⁶

To the same purport it was held in Massachusetts, in the late case of *School District v. Boston, etc. Railroad Company*,⁷ where the defendant set up a special contract that certain iron castings were taken at the

¹ 19 Ohio St. 1.² 25 N. Y. 442.³ 51 Pa. St. 315.⁴ 19 Ohio St. 13, 14.⁵ *Fillebrown v. Gr. Trunk Ry.*, 55 Me. 462.⁶ *Sager v. Portsmouth*, 31 Me. 228 233.⁷ 102 Mass. 552.

Supreme Court of the United States.

owner's risk of fracture or injury during the course of transportation, loading, and unloading, and the court say: "The special contract here set up is not alleged, and could not by law be permitted to exempt the defendants from liability for injuries by their own negligence."¹

To the same purport, likewise, are many other decisions of the State courts, some of which are argued with great force and are worthy of attentive perusal, but, for want of room, can only be referred to here.²

These views as to the impolicy of allowing stipulations against liability for negligence and misconduct are in accordance with the early English authorities. St. Germain, in the *Doctor and Student*,³ pointedly says of the common carrier: "If he would percase refuse to carry it [articles delivered for carriage] unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like."

A century later this passage is quoted by Attorney-General Noy in his book of *Maxims* as unquestioned law.⁴ And so the law undoubtedly stood in England until comparatively a very recent period. Serjeant Stephen, in his *Commentaries*,⁵ after stating that a common carrier's liability might at common law be varied by contract, adds that the law still held him responsible for negligence and misconduct.

The question arose in England principally upon public notices given by common carriers that they would not be responsible for valuable goods unless entered and paid for according to value. The courts held that this was a reasonable condition, and if brought home to the owner, amounted to a special contract, valid in law. But it was also held that it could not exonerate the carrier if a loss occurred by his actual misfeasance or gross negligence. Or, as Starkie says, "Proof of a direct misfeasance or gross negligence is, in effect, an answer to proof of notice."⁶ But the term "gross negligence" was so vague and uncertain that it came to represent every instance of actual negligence of the carrier or his servant, or ordinary negligence in the accustomed mode of speaking.⁷ Justice Story, in his work on *Bailments*, originally published in 1832, says that it is now held that in cases

¹ *Id.* 556.

² *Indianapolis etc. R. Co. v. Allen*, 31 Ind. 394; *Michigan R. Co. v. Heaton*, 31 Ind. 397, note; *Flinn v. Philadelphia R. Co.*, 1 *Houst.* 472; *Orndorff v. Adams Express Co.*, 3 *Bush*, 194; *Swindler v. Hilliard*, 2 *Rich. L.* 286; *Berry v. Cooper*, 28 *Ga.* 543; *Steele v. Townsend*, 37 *Ala.* 247; *Southern Express Co. v. Crook*, 44 *Ala.* 463; *Whitesides v. Thurlkill*, 12 *Smed.*

& *M.* 599; *Southern Express Co. v. Moon*, 39 *Miss.* 822; *New Orleans Mutual Ins. Co. v. New Orleans etc. R. Co.*, 20 *La. An.* 302.

³ *Dial.* 2, c. 38.

⁴ *Noy's Max.* 92.

⁵ *Vol.* 2, p. 135.

⁶ 2 *Stark. on Ev.* (6th Am. ed.) 205.

⁷ *Hinton v. Dibbin*, 2 *Q. B.* 646; *Wyld v. Pickford*, 8 *Mec. & W.* 460.

Railroad Company v. Lockwood.

of such notices the carrier is liable for losses and injury occasioned not only by gross negligence, but by ordinary negligence; or, in other words, the carrier is bound to ordinary diligence.¹

In estimating the effect of these decisions, it must be remembered that in the cases covered by the notices referred to, the exemption claimed was entire, covering all cases of loss, negligence as well as others. They are therefore directly in point.

In 1863, in the great case of *Peek v. North Staffordshire Railway Company*,² Mr. Justice BLACKBURN, in the course of a very clear and able review of the law on the subject, after quoting this passage from Justice Story's work, proceeds to say: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law; but the cases decided in our courts between 1832 and 1854 established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility, even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants; and, as it seems to me, the reason why the Legislature intervened in the Railway and Canal Traffic Act, in 1854, was because it thought that the companies took advantage of those decisions (in Story's language) 'to evade altogether the salutary policy of the common law.'"

This quotation is sufficient to show the state of the law in England at the time of the publication of Judge Story's work; and it proves that at that time common carriers could not stipulate for immunity for their own or their servants' negligence. But in the case of *Carr v. Lancashire Railway Company*,³ and other cases decided whilst the change of opinion alluded to by Justice BLACKBURN was going on (several of which related to the carriage of horses and cattle), it was held that carriers could stipulate for exemption from liability for even their own gross negligence. Hence the act of 1854 was passed, called the Railway and Canal Traffic Act, declaring that railway and canal companies should be liable for negligence of themselves or their servants, notwithstanding any notice or condition, unless the court or judge trying the cause should adjudge the conditions just and reasonable.⁴ Upon this statute ensued a long list of cases deciding what conditions were or were not just and reasonable. The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it. But as we shall have occasion to advert to this subject again, we pass it for the present.

¹ Story on Bail., § 571.

² 10 H. L. Cas. 473.

³ 7 Exch. 707.

⁴ 1 Fish. Dig. 1466.

Supreme Court of the United States.

It remains to see what has been held by this court on the subject now under consideration.

We have already referred to the leading case of *New Jersey Steam Navigation Company v. Merchants' Bank*.¹ On the precise point now under consideration Justice NELSON said: "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents in the transportation of goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

As to the carriers of passengers, Mr. Justice GRIER, in the case of *Philadelphia and Reading Railroad Company v. Derby*,² delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" That was the case of a free passenger, a stockholder of the company, taken over the road by the president to examine its condition; and it was contended in argument, that as to him, nothing but "gross negligence" would make the company liable. In the subsequent case of *Steamboat New World v. King*,³ which was also the case of a free passenger carried on a steamboat, and injured by the explosion of the boiler, CURTIS, J., delivering the judgment, quoted the above proposition of Justice GRIER, and said: "We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law."⁴

In *York Company v. Central Railroad Company*,⁵ the court, after conceding that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, adds: "When such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement." In the case of *Walker v. Transportation Company*,⁶ decided at the same term, it is true, the owner of a vessel destroyed by fire on the lakes was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to

¹ 6 How. 383.

² 14 How. 486; *s. c. ante*, p. 31.

³ 16 How. 463; *s. c. ante*, p. 175.

⁴ *Id.* 474.

⁵ 3 Wall. 113.

⁶ *Id.* 150.

Railroad Company v. Lockwood.

apply to our great lakes as well as to the sea. And in *Express Company v. Kountze Brothers*,¹ where the carriers were sued for the loss of gold-dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge at the trial charged the jury, that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law.²

Some of the above citations are only expressions of opinion, it is true, but they are the expressions of judges whose opinions are entitled to much weight; and the last-cited case is a judgment upon the precise point. Taken in connection with the concurring decisions of State courts before cited, they seem to us decisive of the question, and leave but little to be added to the considerations which they suggest.

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.

We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries and at different times without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of *any* superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities

¹ 8 Wall. 342.

² *Id.* 353.

Supreme Court of the United States.

of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risks of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made; is the company a public carrier as to the twenty parcels, and a private carrier as to the one?

On this point there are several authorities which support our view, some of which are noted.¹

A common carrier may undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck-boat between New York City and Norfolk, should be requested to carry a keg of specie or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended, that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions in his absence he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties, — an object essential to the welfare of every civilized community. Hence the common-law rule which

¹ Davidson v. Graham, 2 Ohio St. 131; Graham v. Davis, 4 Ohio St. 362; Swindler v. Hilliard, 2 Rich. L. 236; Baker v. Brinson, 9 Rich. L. 201; Steele v. Townsend, 37 Ala. 247.

Railroad Company v. Lockwood.

charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case, the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business.

To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in *Dorr v. New Jersey Steam Navigation Company*,¹ the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality.

¹ 11 N. Y. 485.

Supreme Court of the United States.

The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. In the present case, for example, the freight-agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough, — if they did not accept this, they must pay tariff rates. These rates were seventy cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of \$14 for every animal carried, instead of the usual charge of \$70 for a car-load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body-politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The *status* and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them.

Railroad Company v. Lockwood.

It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute, called the Railway and Canal Traffic Act, passed in 1854, which declared void all notices and conditions made by common carriers, except such as the judge at the trial, or the courts, should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law, instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into without regard to the character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts made by common car-

Supreme Court of the United States.

riers with their customers, limiting their liability, are good and valid, so far as they are just and reasonable, — to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part, — when they asked to go still further, and to be excused from negligence, an excuse so repugnant to the law of their foundation and to the public good, they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

On this subject, the remarks of Chief Justice Redfield, in his recent collection of *American Railway Cases*, seem to us eminently just. "It being clearly established, then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant who has a monopoly in his department has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." And his conclusion is, that, notwithstanding some exceptional decisions, the law of to-day stands substantially as follows: "1. That the exemption claimed by carriers must be reasonable and just; otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and therefore not binding. 2. That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold."

The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and

 Railroad Company v. Lockwood.

he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply "negligence." And this seems to be the tendency of modern authorities.¹ If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties, and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it."² Toullier, in his *Commentary on the Code*, regards this as a happy thought, and a return to the law of nature.³ But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence.

The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law-writers, such negligence would be called gross or ordinary.

The conclusions to which we have come are: —

First, That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law.

Secondly, That it is not just and reasonable in the eye of the law for

¹ 1 Smith's Ld. Cas. (7th Am. ed.) 453; Story on Bail., § 571; Wyld v. Pickford, 8 Mee. & W. 443; Hinton v. Dibbin, 2 Q. B. 661; Wilson v. Brett, 11 Mee. & W. 115; Beal v. South Devon R. Co., 3 Hurl. & Colt. 337; Grill v.

General Iron Screw Collier Co., L. R. 1 C. P. 600; Phila. etc. R. Co. v. Derby, 14 How. 486; s. c. ante, p. 31; Steamboat New World v. King, 16 How. 474; s. c. ante, p. 175.

² Art. 1382.

³ Vol. 6, p. 243.

Notes.

a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly, That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Fourthly, That a drover travelling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.

NOTES.

§ 1. **Validity of Contract limiting Liability of Carrier to Passenger traveling upon a Free Pass.**—The principle is well settled that a carrier owes the same duty of protection to a simply gratuitous passenger as to a passenger for hire.¹ It is customary, however, for railway companies to insert in free passes a stipulation whereby the passenger agrees to exempt the carrier from liability for every species of injury resulting from any cause whatever. Contracts of this character are generally to the effect that "the person accepting this free ticket, in consideration thereof, assumes all risk of all accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using the ticket." The validity of this contract is in some cases denied *in toto*, as being void because against public policy.²

The considerations upon which such a view of the contract is taken are, that although it may be true as a general proposition that a person may waive a provision or rule of law intended for his benefit, yet the State has an interest as *parens patriæ* in the preservation of the lives of its citizens, and that a contract of this character is void for the reason that the life of a person accepting its benefits is placed in jeopardy because of the relaxation of the strict rule of responsibility on the part of common carriers (the outgrowth of public policy);

¹ Phila. etc. R. Co. v. Derby, *ante*, p. 31; Steamboat New World v. King, *ante*, p. 175; Indianapolis, etc. R. Co. v. Beaver, 41 Ind. 493.

² Jacobus v. St. Paul etc. R. Co., 20 Minn. 125; s. c. 1 Cent. L. J. 375; Indiana etc. R. Co. v. Mundy, 21 Ind. 48; Knowlton v. Erie R. Co., 19 Ohio St. 260. See also Railway Co. v. Stevens, 95 U. S. 655, 660; Lackawanna etc. R. Co. v. Chenewith, 52 Pa. St. 382. In Iowa, such a contract is rendered void by the fol-

lowing statute: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents or by any mismanagement of the engineers or other employees of the corporation, to any person sustaining such damage, all contracts to the contrary notwithstanding." Rose v. Des Moines etc. R. Co., 39 Iowa, 246, 250.

Notes.

and further, because the influence of such a contract is demoralizing, as tending to lessen the care of the company and its servants for the safety of other passengers.¹

On the other hand, it is said that the mere fact that a man's occupation is that of a common carrier should not prevent him from being able to make a bargain with another as a gratuitous bailee, and that railway companies and other corporations should have this privilege. "I fully agree with the able opinion of the Supreme Court that the contract now under consideration was not made with the defendants in their character as common carriers. The deceased did not choose to bargain with them in their general employment, in which they hold themselves ready to transport passengers for hire, but asked and accepted from them a gratuity."² In the late case of *Railway Company v. Stevens*,³ the court did not find it necessary to pass upon this point. BRADLEY, J., said: "It is often asked with apparent confidence, 'May not men make their own contracts; or, in other words, may not a man do what he will with his own?' The question at first sight seems a simple one. But there is a question lying behind that: 'Can a man call that absolutely his own which he holds as a great public trust, by the public grant, and for the public use as well as his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled." In Great Britain, however, there seems to be no objection to contracts of this character on the ground that they are contrary to public policy.⁴

§ 2. *Drovers' Passes.*—When stock is shipped upon a railroad, it is customary to present the person in charge and his assistants with "drovers' passes," which generally entitle the holder to accompany the stock to their destination and return. Such passes contain the usual stipulation that the person using the same holds the company exempt from responsibility for all injuries caused by the negligence of the company or its servants. The cases are not harmonious as to the *status* of a person using a pass of this kind. By some courts the holder is regarded as a passenger for hire, by reason of the contemporaneous contract for carriage of cattle, and, notwithstanding such release, competent to claim the protection due to other passengers who have paid the regular fare. In the view of others, the holder of such a pass enjoys a mere gratuity or concession on the part of the railroad company, and therefore is bound by the release, the only question in such cases being the construction of the release, — *e.g.*, whether the railroad company will be relieved, by virtue of its terms, from the consequences of gross negligence.

The decision in *Railroad Company v. Lockwood*⁵ is based on the ground that

¹ *Jacobus v. St. Paul etc. R. Co.*, *supra*.
But *contra*, see *Kinney v. Central R. Co.*, 34 N. J. L. 513, 516; *s. c.* 32 N. J. L. 407; *Wells v. New York etc. R. Co.*, 24 N. Y. 181, 185.

² *Van Syckel, J.*, in *Kinney v. Central R. Co.*, 34 N. J. L. 513, 515; *s. c.* 32 N. J. L. 407. See also *Bissell v. New York etc. R. Co.*, 25 N. Y. 442; *Perkins v. New York etc. R. Co.*, 24 N. Y. 196; *Wells v. New York etc. R. Co.*, 24 N. Y. 181; *Knowlton v. Erie R. Co.*, 19 Ohio St. 260.

³ 95 U. S. 655, 660.

⁴ *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *s. c.* 42 L. J. (Q. B.) 4; 21 Week. Rep. 140; 27 L. T. (N. S.) 485; *Gallin v. London etc. R. Co.*, L. R. 10 Q. B. 212; *s. c.* 44 L. J. (Q. B.) 89; 23 Week. Rep. 308; 32 L. T. (N. S.) 550; 2 Cent. L. J. 217; *Duff v. Great Northern R. Co.* (Irish High Ct. Just., Exch. Div., February 19, 1879), 41 L. T. (N. S.) 197; *s. c.* 20 Alb. L. J. 398.

⁵ *Ante*, p. 378.

Stipulations in Drivers' Passes.

the plaintiff was a customer, having no reasonable and practicable alternative of transacting his business other than by accepting such a pass, and that the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity. Precisely this conclusion, on identical facts, has been reached in other cases.¹ But in *Bissell v. New York, etc. Railroad Company*² the contrary view was taken. SMITH, J., held that there was no consideration, in the technical sense of the term, arising out of the contract of carriage of cattle which could constitute a consideration for the ordinary drivers' pass, thereby rendering the person carried upon it a passenger for hire, saying: "It is undoubtedly true that he received such free ticket, and it was given him by the defendants in consideration of the business and profits received from him from the freight of the stock which he accompanied. So, in all cases when free tickets are given, I suppose there is some consideration of interest or profit or advantage received or expected, which constitutes the inducement to the giving of the ticket. In this sense, there would probably seldom if ever be given by a railroad company a strictly free ticket." From this view DENIO, C. J., SUTHERLAND and WRIGHT, JJ., dissented.

Previous to this decision, and in the same year, this court had held, in the case of *Smith v. New York, etc. Railroad Company*,³ that a person travelling upon a drover's pass was not to be regarded as a gratuitous passenger. It may now be considered as the settled law of this State that a person riding on such a pass is not to be considered as a passenger for hire; at least this position is not questioned in subsequent cases of this character.⁴ And such would seem to be the law of England.⁵

¹ *Cleveland etc. R. Co. v. Curran*, 19 Ohio St. 1; *Ohio etc. R. Co. v. Selby*, 47 Ind. 471; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Flynn v. Phila. etc. R. Co.* 1 Houst. 469. In *Graham v. Pacific R. Co.*, 66 Mo. 536, the plaintiff accompanied a load of stock to St. Louis upon a drover's pass to St. Louis and return. On his return, he got upon an accommodation-train which stopped short of the point designated in the pass, his intention being to stop at a way-station. The conductor refused to honor this pass upon his train, and for non-payment of fare he was put off. A verdict for the plaintiff was sustained. The same court has held that a pass obtained by a drover for his wife, on the fraudulent representation that she owned a portion of the stock which he had shipped, confers no rights upon her. *Brown v. Missouri etc. R. Co.*, 64 Mo. 536. See also *Railway Co. v. Stevens*, 95 U. S. 655, in which case the court reaffirmed its decision in *Railroad Co. v. Lockwood*, *supra*. The facts of this case were that the plaintiff, at the request of the defendants, was travelling upon their line upon a free pass exempting the company from the consequences of "negligence by its

agents or otherwise," for the purpose of seeing the superintendent of the road in regard to introducing a patent car-coupling of which the plaintiff was the inventor. The defendants had agreed to pay the plaintiff's expenses upon this trip, and incidentally thereto had given him this pass. Bradley, J., was of opinion that the transportation of the plaintiff was in no sense a matter of charity or gratuity. The plaintiff was a passenger for hire, and as such entitled to all the rights of other passengers, notwithstanding the stipulation upon the pass.

² 25 N. Y. 442, 453 (reversing s. c. 29 Barb. 602). See also *Boswell v. Hudson etc. R. Co.*, 10 Abb. Pr. 442.

³ 24 N. Y. 222; s. c. 29 Barb. 132.

⁴ *Stinson v. New York etc. R. Co.*, 32 N. Y. 333; *Poucher v. New York etc. R. Co.*, 49 N. Y. 263.

⁵ *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57; s. c. 42 L. J. (Q. B.) 4; 21 Week. Rep. 140; 27 L. T. (N. S.) 485; *Gallin v. London etc. R. Co.*, L. R. 10 Q. B. 212; s. c. 44 L. J. (Q. B.) 89; 23 Week. Rep. 308; 32 L. T. (N. S.) 550; 2 Cent. L. J. 217; *Duff v. Great Northern R. Co.*, 41 L. T. (N. S.) 197; s. c. 20 Alb. L. J. 393.

Notes.

§ 3. What Negligence is covered by such a Release. — When it is settled that the contract of release contained in a free pass is not against public policy, the question arises, What negligence is covered by its terms? Upon this point, also, there is a conflict of authority. Although a company may stipulate for an exemption from the consequences of negligence of its servants, yet it cannot do so in regard to negligence which is imputable to the corporation itself.¹ In *Bissell v. New York, etc. Railroad Company*,² the Supreme Court held that gross negligence could not be excused by contract, in reference to passengers for hire; but the Court of Appeals took a different view, holding the person injured in this case was not a passenger for hire, and that the company were shielded by the contract from the consequences of even gross negligence on the part of its servants. And this is the rule in England in regard to this phase of the contract.³ In *Kinney v. Central Railroad Company*,⁴ it was not expressly decided that "gross" negligence would be included in such a contract, but the court evidently leaned to this opinion, and deprecated the use of terms indicating degrees of negligence. But elsewhere it is settled that such a contract does not relieve the company from the consequences of the gross negligence of its servants.⁵

But if a passenger is guilty of fraud in using a free pass issued to a different person, which is not transferable, pretending that he is the person to whom it was issued, the company will be liable only for gross negligence which would amount to wilful injury.⁶ When a person has accepted a free pass which guarantees the usual exemption to the carrier from the consequences of negligence, the carrier will be so protected although the accident occurs before the journey has commenced, while the holder of the pass is on the premises with a view to taking his departure,⁷ or is injured after leaving the train, in the course of his departure from the defendant's premises.⁸

¹ *Perkins v. New York etc. R. Co.*, 24 N. Y. 196.

² 25 N. Y. 442; s. c. 29 Barb. 602. See also *Wells v. New York etc. R. Co.*, 24 N. Y. 181; *Perkins v. New York etc. R. Co.*, 24 N. Y. 196, 205. *Contra*, *Boswell v. Hudson etc. R. Co.*, 5 Bosw. 690.

³ *McCawley v. Furness R. Co.*, and *Gallin v. London etc. R. Co.*, *supra*.

⁴ 24 N. J. L. 513, 517.

⁵ *Arnold v. Illinois etc. R. Co.*, 83 Ill. 273; *Pennsylvania R. Co. v. McCloskey's Ad-*

ministrators, 23 Pa. St. 526; *Illinois etc. R. Co. v. Read*, 37 Ill. 484; *Indiana etc. R. Co. v. Mundy*, 21 Ind. 48; *Toledo etc. R. Co. v. Beggs*, 85 Ill. 80.

⁶ *Toledo etc. R. Co. v. Beggs*, *supra*.

⁷ *Poncher v. New York etc. R. Co.*, 49 N. Y. 263. But see *Stinson v. New York etc. R. Co.*, 32 N. Y. 333.

⁸ *Gallin v. London etc. R. Co.*, L. R. 10 Q. B. 212; s. c. 44 L. J. (Q. B.) 89; 23 Week. Rep. 308; 32 L. T. (N. S.) 550; 2 Cent. L. J. 217.

CHAPTER XII.

USE OF ANOTHER'S MEANS OF TRANSPORTATION — LIABILITY OF CARRIER TO PASSENGER FOR CONSEQUENTIAL INJURIES.

- LEADING CASES: 1. *Great Western Railway Company v. Blake*. — Liability of railway company in using another's track.
2. *McElroy v. Nashua and Lowell Railroad Corporation*. — Liability of railway company for injury to their passengers through negligence of another company using their track.

- NOTES: § 1. General statement of liability.
2. Carrier chargeable with the negligence of the company whose line is used.
3. Carrier using the line of another company under statutory authority.
4. Parties to action — *Respondeat superior*.
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1. LIABILITY OF RAILWAY CARRIER IN USING ANOTHER'S TRACK.

GREAT WESTERN RAILWAY COMPANY *v.* BLAKE.*

English Court of Exchequer Chamber, 1862.†

1. **The Principle of this Liability stated.** — Railway companies are bound to use due and reasonable care to keep the line over which they contract to carry passengers in safe condition. This obligation attaches where they convey their passengers over the line of another company. The latter is regarded as the agent of the contracting carrier for this purpose.
2. **Case in Judgment.** — The plaintiff purchased a ticket of the defendants, paying his fare to a station beyond the defendants' line, and upon a connecting line. By arrangement between the two companies, the defendants were permitted to use the line of the other company for the transportation of their carriages, and the fares were apportioned between them. The plaintiff continued in the same carriage throughout the entire journey, and after the train had passed upon the line of the other company, it came into collision with a locomotive left on that line by the servants thereof, injuring the plaintiff. There was no negligence on the part of the driver of the defendants' train. The defendants were held responsible for this injury, under their implied contract to maintain the line over which the plaintiff must travel in their carriages, in a condition fit for traffic.

* Reported, 7 Hurl. & N. 987.

† This case was heard before Cockburn, C. J., Wightman, Crompton, Keating, Byles, and Mellor, JJ.

Great Western Railway Company v. Blake.

ERROR on a bill of exceptions. The declaration stated that the plaintiff, at the request of the defendants, became and was a passenger in a carriage, being one of a train of railway carriages, to be by the defendants safely and securely carried and conveyed on certain railways, on a journey from one place to another distant place, — to wit, from London to Milford, — for hire and reward to the defendants in that behalf. Yet the plaintiff saith, that, by and through the negligence, carelessness, default, and improper conduct of the defendants, the carriage in which the plaintiff was carried and conveyed during the said journey, whilst the plaintiff was such passenger as aforesaid, was suddenly checked by, and received a sudden and violent concussion from, the train of carriages, of which the said carriage formed one, coming into contact and collision with, and running and striking with great force and violence against and upon, a locomotive-engine; and thereby the plaintiff was greatly and permanently injured in his body, etc.

Pleas: First, not guilty; secondly, that the plaintiff did not become, nor was he, a passenger to be by the defendants safely or securely carried or conveyed on the said journey in the declaration mentioned, as alleged. Issues thereon.

The cause was tried before MARTIN, B., at the London Sittings after Trinity Term, 1860, when the following facts appeared: The defendants were common carriers of passengers for hire, and have a station at Paddington, in London, and contract with passengers by one contract, and for one entire fare, to carry and convey them from Paddington to Milford in Pembrokeshire. On the evening of the 30th of December, 1859, the plaintiff purchased the usual ticket from the defendants and paid his fare, and became a passenger to be conveyed by the defendants from Paddington to Milford by the mail-train. The contract between the plaintiff and defendants was the ordinary one which the law implied. The line of railway belonging to the defendants terminates at Grange Court, a short distance beyond Gloucester, and the line from thence to Milford belongs to the South Wales Railway Company. There is an arrangement between the two companies, under which the lines are worked and the fares paid by the passengers apportioned between them. The plaintiff was conveyed, in the same carriage which he entered at Paddington, past Grange Court and onwards towards Milford. After the train had passed on to the South Wales line, it came into collision with a locomotive engine left on that line by the servants of the South Wales Railway Company, and the plaintiff was seriously injured by the concussion. There was no negligence on the part of the driver of the train.

English Court of Exchequer Chamber.

The learned judge told the jury that the circumstance that the engine was left upon the line by the servants of the South Wales Railway Company, and not by the servants of the defendants, did not relieve the defendants from their legal liability, but that they were by law responsible for such negligent and improper act; whereupon the jury found a verdict for the plaintiff.

The defendants' counsel having tendered a bill of exception to the above ruling, and proceedings in error having been taken thereon, the case was now argued by —

Bovill (with whom was *Digby*), for the plaintiffs in error (the defendants below). — The injury was caused by the negligence of the South Wales Railway Company, not of the Great Western Railway Company. [COCKBURN, C. J. — The contract was with the Great Western Railway Company to carry the whole distance from Paddington to Milford. Formerly, if a person booked a place in a stage-coach for a particular distance, though the coach proprietor made a subcontract with another person to horse the coach for some part of the way, he was liable for negligence on that part. So here there is a contract to carry the plaintiff to a given place, and a subcontract to carry on the line of another company.] The Great Western Railway Company merely run their carriages over the South Wales line. The servants on that line are the servants of the South Wales Company, over whom the Great Western Railway Company have no control. [COCKBURN, C. J. — It was part of their contract that they would take reasonable care to keep the railway in a secure state throughout the whole distance, and they have failed to discharge that duty. It is now settled that where a person sends goods by a railway company who use for a portion of the distance the line of another company, if the goods are lost, the remedy is against the company with whom the contract was made.] There is no undertaking by the Great Western Railway Company that the line of railway they use shall be in a safe condition. In the case of goods, the liability depends upon whether the company are common carriers throughout the whole distance; and if so, they are insurers, except as to the act of God and the queen's enemies. The 8 and 9 Vict., c. 20, § 87, enables one company to contract with another for passing over their railway; and by the eighty-ninth section, the company is not to be liable to a greater extent than common carriers. Coach proprietors are not liable for injury arising from accident, where there is no negligence in the driver.¹ An undertaking "safely and securely" to carry, only creates

¹ *Aston v. Heaven*, 2 Esp. 533; *Crofts v. Waterhouse*, 3 Bing. 319.

Great Western Railway Company v. Blake.

a duty to use an ordinary degree of care.¹ The plaintiff below must establish that the arrangement under which the Great Western Railway Company used the line of the South Wales Company made the servants of the latter, who caused the injury, the servants of the former. But the mere bargain did not transfer the liability for negligence from one company to the other. [COCKBURN, C. J. — What is there, in a contract by a passenger with a railway company, to make their liability less over one portion of the line over which they carry than another?] The Great Western Railway Company have merely permission to use the line of the South Wales Railway, and by giving tickets to passengers to travel over that line, they undertake that they will use ordinary care, not that they will be responsible for the acts of servants over whom they have no control. [CROMPTON, J. — Their contract is, “I will carry you by myself and my subcontractor.”] He also referred to *Latch v. Rumner Railway Company*.²

Parry, Serjt. (with whom was *Archibald*), appeared for the defendant in error (the plaintiff below), but was not called upon to argue.

COCKBURN, C. J. — I am of opinion that the direction of the learned judge was right, and that the judgment of the court below ought to be affirmed. It has been settled that where a railway company enters into a contract for the conveyance of goods to a distance extending not merely over their own line, but over the whole or some portion of any other line of railway with which it is connected, the company so contracting is liable not only for the loss of the goods upon their own line, but also in respect of the loss of goods upon the line not their own. I think that position obtains in the case of passengers. If a railway company chooses to contract to carry passengers not only over their own line, but also over the line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to them if they had contracted solely to carry over their own line. Here there was a contract between the Great Western Railway Company and the South Wales Railway Company, by which the former are enabled to carry passengers not only over their own line, but also over the South Wales line. Under these circumstances, the Great Western Railway Company became responsible for the safety of every passenger throughout the distance for which they gave him a ticket, just as if they had conveyed him on their own line.

This brings us to the simple question how far the company are bound

¹ *Ross v. Hill*, 2 C. B. 877.

² 27 L. J. (Exch.) 155.

English Court of Exchequer Chamber.

to use reasonable care for the safety of passengers, as well on their own line as on the passage over another line. Looking at the construction of railways, and the powers which railway companies enjoy, there is no doubt it is part of the contract that they shall use reasonable care to maintain their railway in proper condition for the conveyance of passengers. This is not like the case of a stage-coach proprietor, because the road is not in his hands, and he has no means of securing its proper condition. When the contract is entered into, the road would be in a certain condition, without any thing being required to be done on the part of the coach proprietor to keep it in a safe condition. Railway companies ought at least to use due and reasonable care to keep the line over which they contract to carry passengers in a safe condition. There is no doubt that is the obligation which attaches to a railway company who undertake to convey passengers through the whole distance on their line; and if by arrangement with another company they convey passengers over the whole or part of another line, the same obligation attaches, and they make the other company their agent, and on their part they undertake that the other company shall keep their line in a proper condition.

It is unnecessary to say whether the plaintiff below would have had a right of action against the South Wales Railway Company; at all events, he has against the Great Western Railway Company. It would be inconsistent with public convenience and safety to put any other construction on such a contract than that the Great Western Railway Company should be primarily liable to the plaintiff below, and should take their remedy against the South Wales Company, whose servants, by their negligence, have caused the accident; whilst to hold that the Great Western Railway Company is liable, is not only consistent with public convenience, but also the true construction of the contract.

WIGHTMAN, J. — I concur in the opinion, though not without some hesitation.

CROMPTON, J. — I am of the same opinion. When the Great Western Railway Company gave a ticket to the plaintiff to travel from Paddington to Milford, they took upon themselves all the responsibilities by which a railway company is bound with reference to the carriage of passengers the whole distance. I say the carriage of passengers, because Mr. *Bovill* has distinguished between passengers and goods as regards the extent of liability. When railways were first established, some companies would only undertake to convey passengers part of the way on a long journey on their own line; others conveyed passengers

Great Western Railway Company *v.* Blake.

beyond their own lines, but refused to be responsible for what might occur on a line not their own; others made an arrangement with other companies by which, for one fare for the whole distance, they undertook to convey passengers to particular places on the line of another company. Here, the Great Western Railway Company having made arrangements with the South Wales Railway Company for the carriage of passengers to Milford, and for dividing the fares between them, one of the responsibilities which they took upon themselves was that the line should be safe and secure the whole distance. Whether, under these circumstances, a passenger would have a remedy against the South Wales Railway Company may be doubtful, because there is no privity between them; but the Great Western Railway Company has a remedy against the South Wales Railway Company.

BYLES, J. — I am of the same opinion. The express finding that by arrangement between the two companies the fares are apportioned between them, involves this proposition: that when the Great Western train comes upon the South Wales line, as the profits are divided between the Great Western and South Wales companies, for the purpose of this action the South Wales line became the Great Western line, and the Great Western Company were bound to take due care with respect to the machinery,—that is, the engines, carriages, and line. It is sufficient to rest there; but, if necessary, I should go further, and say that, without the arrangement as to profits, the Great Western Company, by their contract with the plaintiff below, were as much bound to take care of the machinery as if the whole line was their own. Possibly the South Wales Railway Company might have been liable to the plaintiff below; yet here is a contract from which results a duty on the part of the Great Western Railway Company to take due care that the machinery from Paddington to Milford is safe and secure.

KEATING, J. — I concur in opinion that the ruling of the learned judge was correct.

MELLOR, J. — I am of the same opinion. The effect of the arrangement between the two companies was to make the line of the Great Western Company one line from Paddington to Milford. I do not say how it would be if the Great Western Company had run over the line of the South Wales Company on payment of tolls. I do not dissent from what my brother BYLES has said on that point; but I express no opinion upon it, as it is not necessary for the decision of this case.

Judgment affirmed.

 Supreme Judicial Court of Massachusetts.

2. LIABILITY OF RAILWAY COMPANY FOR INJURY TO THEIR PASSENGERS THROUGH NEGLIGENCE OF ANOTHER COMPANY USING THEIR TRACK.

McELROY v. NASHUA AND LOWELL RAILROAD CORPORATION.*

Supreme Judicial Court of Massachusetts, 1849.

 Hon. LEMUEL SHAW, *Chief Justice.*

" SAMUEL S. WILDE,	} <i>Judges.</i>
" CHARLES A. DEWEY,	
" THERON METCALF,	
" RICHARD FLETCHER,	

1. **General Principle.**—The proprietors of a railroad, as passenger-carriers, are bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their track and in all the subsidiary arrangements necessary to the safety of passengers.
2. **Illustration.**—A railroad company are responsible for an injury sustained by a passenger in their cars in consequence of the careless management of a switch by which another railroad connects with and enters upon their road, although the switch is provided by the proprietors of the other road, and attended by one of their servants at their expense.

THIS was an action on the case to recover damages of the defendants for an injury alleged to have been sustained by the female plaintiff while riding as a passenger in the defendants' cars from Lowell to Nashua. The case was submitted to the court upon an agreed statement of facts.

The defendants are common carriers, carrying passengers for hire between the above-mentioned places, and the female plaintiff had taken her passage and paid the fare from Lowell to Nashua in the evening train of the defendants.

By the thirteenth section of the act of incorporation granted to the defendants by the Legislature of New Hampshire, power was reserved to authorize any other railroad corporation to connect with, enter upon, and use the Nashua and Lowell Railroad at a point where the Concord Railroad was afterwards made to enter upon the same, and at the point where the alleged injury was incurred. After the incorporation of the defendants, the Legislature of New Hampshire also incorporated the Concord Railroad Corporation, and granted them the right to connect with and enter upon and use the Nashua and Lowell Railroad at the point where they did enter the same, and where the accident happened.

* Reported, 4 Cush. 400.

 McElroy v. Nashua and Lowell Railroad Corporation.

The Concord Railroad Corporation, in accordance with the powers thus granted, made a switch and connecting-track in the defendants' road, so as to pass to and from the same, and entered thereon and placed a switchman there, to let the Concord cars pass on and off the road. This switchman, at the time of the accident and ever before, was the servant of the Concord Railroad Corporation, and was in nowise the servant of the defendants, or in any manner under their authority or control. By an arrangement between the two corporations, the defendants hauled the cars of the Concord Railroad Corporation over their road to Lowell, after they had entered thereon, and also hauled them back from Lowell to a point about a fourth of a mile below the junction of the Concord Railroad, and there detached them and went on over the switch to the end of the road, leaving the Concord train to follow by force of the momentum previously given to them, but at so slow a speed as to arrive at the switch after the defendants' train had passed, and then to be switched off by the switchman upon the Concord Railroad.

On the evening in question, the Concord train was detached as usual, and the defendants' cars, in the rear of one of which the female plaintiff was, passed on, and the engine, tender, and forward car passed over the switch in safety; but by the carelessness of the switchman, the switch became changed, so that the defendants' baggage-car and the passenger-car above mentioned were turned off upon the Concord Railroad and broken from the forward cars, and thereby and thereon the injury was occasioned for which this action was brought.

The defendants were incorporated by the Legislature of New Hampshire to build that part of their road which lies in that State, and by the Legislature of this Commonwealth to build that portion of their road which is in this State; and the two corporations were afterwards united by acts of the Legislatures of this Commonwealth and New Hampshire. The point where the accident happened is in New Hampshire.

The question of damages only was submitted to the jury, and a verdict was taken by consent for the plaintiff, upon the facts as above stated, subject to the opinion of the whole court.

J. G. Abbott, for the plaintiffs, cited *Ingalls v. Bills*,¹ *Story on Bailments*,² *Angell on Carriers*,³ *Stokes v. Saltonstall*,⁴ *Bostwick v. Champion*,⁵ *Cole v. Goodwin*,⁶ and *Waland v. Elkins*.⁷

¹ 9 Metc. 1; s. c. ante, p. 112.

² §§ 601, 602. ³ §§ 536-538.

⁴ 13 Pet. 181; s. c. ante, p. 183.

⁶ 11 Wend. 571.

⁶ 19 Wend. 251.

⁷ 1 Stark. 272.

Supreme Judicial Court of Massachusetts.

T. Wentworth, for the defendants, cited *Angell on Carriers*,¹ *Story on Bailments*,² *Bennett v. Dutton*,³ *Hawkins v. Hoffman*,⁴ *Boyce v. Anderson*,⁵ and *McKinney v. Neil*.⁶

SHAW, C. J. — The court are of opinion, upon the facts agreed, that the defendants are liable to the plaintiffs for the damage sustained by the wife whilst travelling in their cars. As passenger-carriers, the defendants were bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers. The wife having contracted with the defendants and paid fare to them, the plaintiffs had a right to look to them, in the first instance, for the use of all necessary care and skill. The switch in question, in the careless or negligent management of which the damage occurred, was a part of the defendants' road, over which they must necessarily carry all their passengers; and although provided for and attended by a servant of the Concord Railroad Corporation, and at their expense, yet it was still a part of the Nashua and Lowell Railroad, and it was within the scope of their duty to see that the switch was rightly constructed, attended, and managed, before they were justified in carrying passengers over it. Had the action been, in form, on the implied contract of the defendants, in undertaking to carry a passenger, to have a safe road and apply and use all necessary care and skill, the liability of the defendants might have been more clear and manifest; but the duty is the same, and in most cases of this kind of carelessness, negligence, or want of due skill, in the performance of duty undertaken to be done for hire and reward, it is at the election of the plaintiff to declare in *assumpsit* and rely on the promise, or to declare in *tort* and rest on the breach of duty. Whether the plaintiffs might have maintained an action on the case against the Concord Railroad Corporation for the negligence of their servant, or whether the defendants may have a remedy over against the Concord Railroad Corporation, by the terms of the statute under which the latter were allowed to come on to the defendants' road, or by the terms of their contract, we give no opinion.⁷

Judgment on the verdict for the plaintiffs.

¹ §§ 521, 523.

² §§ 590, 602.

³ 2 Pet. 150.

⁴ 10 N. H. 481; s. c. *ante*, p. 2.

⁵ 1 McLean, 540.

⁶ 6 Hill, 586.

⁷ *Waland v. Elkins*, 1 Stark. 272.

General Statement of Liability.

NOTES.

§ 1. **General Statement of Liability.**—To facilitate transportation, it frequently becomes necessary for carriers by railway to run their trains over each other's roads. This is effected in various ways: The carrier having reached the terminus of its route, may proceed over some connecting line, retaining full control of its train, paying a toll, or something equivalent, to the owners of the other road; or it may become necessary for the first carrier to wholly or partially abandon the control of its train to the servants of the other company. Injuries to passengers under such circumstances have raised nice questions as to whom the passenger might look for compensation in damages. It sometimes happens, as in *McElroy v. Nashua, etc. Railroad Company*,¹ that the injury is hardly traceable to any fault on the part of the carrier of the passenger, and sometimes not at all; however, a simple and severe rule has been quite generally adopted in such cases: viz., to hold the carrier who first received the passenger, and with whom the contract of transportation was made, to the same degree of liability as if this company owned and controlled the entire length of line traversed, the reason being that the carrier having contracted to furnish his passengers with a safe, expeditious, and comfortable passage, is presumed to have the means of so doing, or at least is bound to do it.²

§ 2. **Carrier chargeable with the Negligence of the Company whose Line is used.**—The cases of *Birkett v. Whitehaven Junction Railway Company*³ and *Great Western Railway Company v. Blake*⁴ are most frequently cited in this connection. In the first of these cases, the plaintiff's intestate bought a ticket of the defendant company. To reach his destination it was necessary for the train of this company to pass over the line of another company. This last company had constructed a self-acting switch upon its line, for the exclusive use of the defendant company for this purpose. The switch was about four yards from a gate on the line of the defendant company. The gate-keeper, a servant of the defendant, was in the habit of looking over the gate to see that the switch was in proper order. The train of the defendant company upon which the plaintiff's intestate was riding ran slowly over this switch, but the points being turned the wrong way, it collided with some coal-trucks, whereby this passenger was killed. There was evidence that such switches as this were liable to get out of order, and the Court of Exchequer Chamber held that it was properly left to the jury to say whether the defendant was not negligent in not having this switch more properly guarded. No opinion was given on the general question as to whether a railway company undertakes for the safety of other lines over which its trains travel

¹ *Ante*, p. 409.

² *Birkett v. Whitehaven Junction R. Co.*, 4 Hurl. & N. 730; *Great Western R. Co. v. Blake*, *ante*, p. 403; *Buxton v. North-Eastern R. Co.*, L. R. 3 Q. B. 549; *Thomas v. Rhymney R. Co.*, L. R. 5 Q. B. 226; *s. c.* (affirmed in Exchequer Chamber) L. R. 6 Q. B. 266; *John v. Bacon*, L. R. 5 C. P. 437;

Murch v. Concord R. Co., 29 N. H. 9; *Seymour v. Chicago etc. R. Co.*, 3 Biss. 43; *Peters v. Rylands*, 20 Pa. St. 497; *s. c.* 1 Phila. 264; *McLean v. Burbank*, 11 Minn. 277; *Champion v. Bostwick*, 11 Wend. 571, 581; *s. c.* 18 Wend. 175, 181. *Contra*, *Sprague v. Smith*, 29 Vt. 421.

³ 4 Hurl. & N. 730.

⁴ 7 Hurl. & N. 987, *ante*, p. 403.

Negligence of the Company whose Line is used.

In the other case,¹ the governing principle of these cases is clearly indicated by COCKBURN, C. J., as follows: "Railway companies ought at least to use due and reasonable care to keep the line over which they contract to carry passengers in a safe condition. There is no doubt that is the obligation which attaches to a railway company who undertake to convey passengers through the whole distance on their line; and if, by arrangement with another company, they convey passengers over the whole or part of another line, the same obligation attaches, and they make the other company their agent, and on their part they undertake that the other company shall keep their line in proper condition."²

Subsequently, in the Court of Queen's Bench,³ upon the authority of this case, it was held that a railway company were responsible in damages for an injury to a passenger on their train while it was running over the line of another company, the train being thrown from the track by striking a bullock which had strayed upon it by breaking through a defective fence. LUSH, J., stated that even in the absence of the foregoing authority he should nevertheless hold that "a company undertaking to carry passengers over another line is answerable for negligence happening on it just as much as if it happened on their own line."⁴

The current of authority in this country is much the same as that of the foregoing decisions. Thus, it is said: "By using the railroad of another corporation as a part of their track, whether by contract or mere permission, they would ordinarily, for many purposes, make it their own, and would assume towards those whom they had agreed to receive as passengers all the duties resulting from that relation as to the road; and if accident resulted to such passengers from any failure of duty of the owners of the road, for which they would be responsible if the road was their own, their remedy over would be against the owners."⁵

In a case before Mr. Justice DAVIS, of the United States Supreme Court, sitting in the Circuit Court,⁶ where the defendant used the station of another company by arrangement with them, and the plaintiff, a passenger of the defendant, slipped upon some pieces of ice scattered upon the platform of the station, injuring herself, the jury were charged that it was the duty of the defendant to see that the platform used by it was safe and convenient for passengers to get in and out of the cars, regardless of any arrangement with the company owning the building.⁷

The owners of passenger-cars run upon a railroad belonging to the State are liable for an injury sustained by a passenger from the collision of two of their trains passing in the same direction, though the motive power of the road was furnished by the State and was under the control of the State's agents, and though the accident happened through the negligence of the agents of the State. The carrier having contracted with the passenger under such circumstances, is chargeable accordingly.⁸

¹ Great Western R. Co. v. Blake, *ante*, p. 403.

² 7 Hurl. & N. 992.

³ Buxton v. North-Eastern R. Co., L. R. 3 Q. B. 549.

⁴ L. R. 3 Q. B. 554. Substantially is the language of Byles, J., in Great Western R. Co. v. Blake, 7 Hurl. & N. 987, 994, *ante*, p. 403.

⁵ Murch v. Concord R. Co., 29 N. H. 9, 35.

⁶ Seymour v. Chicago etc. R. Co., 3 Biss. 43.

⁷ To the same effect is John v. Bacon, L. R. 5 C. P. 437.

⁸ Peters v. Rylands, 20 Pa. St. 497; *s. c.* 1 Phila. 261.

Notes.

So, where it became necessary for a stage-coach to cross a ferry, and by the negligence of the proprietors of the ferry the life of a passenger on the stage-coach was lost, the owners of the stage-coach were held responsible for this mishap, under their contract with the passenger.¹

Contrary to the foregoing cases is a decision by REDFIELD, C. J.,² and, we believe, the only one of its kind in this country. The defendants were trustees operating a railroad upon which the plaintiff was a passenger. These trustees had an arrangement with another railroad company, upon which freight was received from the defendants' road and transported on the cars of the defendants, a division of the receipts being made between them. Upon the occasion of injury to the plaintiff, the car in which he was riding was upon the track of the other company, waiting for another train to pass, when a freight-train belonging to such company was carelessly backed into the car in which the plaintiff was seated, whereby he was seriously injured. The learned judge stated that he did not perceive how the ordinary rule of liability of the carrier could apply to a case of this kind, because the party doing the injury was in no manner subject to the control of the defendants, saying: "He [the carrier] cannot be regarded as liable, we think, for all the acts of all the operatives of the companies over whose roads he carries the plaintiff, unless some connection between the roads, of a character similar to that of general partnership or the consolidation of their interests in the carrying business, is shown, which was not done in the present case."

This case was decided in 1857, since which date there have been many decisions pointedly in conflict with the foregoing remarks. The language of COCKBURN, C. J., in *Great Western Railway Company v. Blake*³ is especially noticeable in this connection. The objection to this decision is that it holds the carrier to no higher degree of liability for the negligence of another carrier with whom it has traffic arrangements than for that of a stranger.⁴ It would seem quite reasonable to say that the defendants in this case had, or ought to have had, a thorough knowledge of the perils to which their train would be exposed in passing over the other road. It is equally reasonable to say that they contracted to protect the plaintiff from these perils of which he could have no definite knowledge; and such, as we have seen, is the result of the authorities.⁵

For the same reason as prevailed in the foregoing cases, if a railroad company permit another company to run trains over its track, and a collision ensues between trains belonging to the different companies, the passengers of the former company injured, in consequence, will have a right of action against their carrier, although the accident may be wholly imputable to the fault of the servants of the latter. This is so because it would be unjust that the carrier, who has been invested with certain franchises for public purposes, should be

¹ McLean v. Burbank, 11 Minn. 277.

² Sprague v. Smith, 29 Vt. 421.

³ 7 Hurl. & N. 987, 992, ante, p. 403.

⁴ Latch v. Rumner R. Co., 27 L. J. (Exch.) 155.

⁵ See in this connection especially *Great Western R. Co. v. Blake* (ante, p. 403), and *Thomas v. Rhymney R. Co.* (L. R. 5 Q. B. 226; s. c. L. R. 6 Q. B. 266), where the accident

happened under similar circumstances, a case stronger against the plaintiff than that under discussion, because in the former case the defendants' train ran over the road on which the accident happened, in pursuance of statutory authority, while the traffic arrangements in this case were the result of private agreement.

Statutory Authority to use another Carrier's Road.

permitted to derive a profit therefrom, at an enhanced risk to his passengers, without additional responsibility therefor. In a case before Mr. Justice DAVIS, on the circuit, he charged the jury that if the road on which the accident occurred belonged to the defendant, and, by its charter, was under its sole control to carry passengers and property, and if it allowed the trains of another company to run over it under the management of the agents of such company, it should be done in such a manner as not to interfere with the safety of the passengers of the defendant; that as to such passengers, the fault of the other company in running their train was the fault of the defendant.¹ Similarly it has been held that a railroad company is liable to the owner of stock killed by the train of another company permitted to use its road.²

§ 3. **Carrier using the Line of another Company under Statutory Authority.**—In the cases we have previously noticed, the use of the line of one company for the accommodation of another company was purely a matter of private arrangement. It remains to be seen whether the rule adopted in such cases will apply where by statute one company is vested with "running powers" over the line of another. This question was raised for the first time in *Thomas v. Rhymney Railway Company*.³ There, the plaintiff took a ticket of the defendants to be carried as a passenger from A., through B., to C. At B. the defendants' line joined the line of another company, over which the defendants had statutory running powers⁴ from B. to C. on the payment of certain tolls, the whole of the traffic arrangements being left by the statute in the control of the company whose line was thus traversed. After leaving B., the train of the defendants in which the plaintiff rode came into collision with a train of the other company, injuring the plaintiff. The defendants' servants were not negligent; and the collision was owing to the negligence of the servants of the other company in sending on their own train without the proper tail-light, and allowing the defendants' train to proceed on the same track too soon after the other train, without giving any warning to the servants of the defendants in charge. The judges of the Court of Queen's Bench, though hesitating, were of opinion that the rule announced in the previous cases ought to apply in this case. MELLOR, J., said: "I confess my present opinion is that the defendants ought not to be liable, and that a railway company can only be held responsible for the negligence of those over whom they have control."⁵ LUSH, J., who delivered the opinion of the court in *Buxton v. North-Eastern Railway Company*,⁶ stated that the distinction between this and the previous cases was not present to his mind when he decided that case, but he thought such a case as this might be included in the expressions used by BYLES, J., in *Great Western Railway Company v. Blake*,⁷ and his own decision in *Buxton v. North-Eastern Railway Company*.⁸ Accordingly, judgment was entered against the defendants.

This case was appealed to the Court of Exchequer Chamber,⁹ where the decision of the court below was affirmed. KELLY, C. B., who delivered the prin-

¹ *Barron v. Illinois etc. R. Co.*, 1 Biss. 453;

² *c. affirmed* in 5 Wall. 90.

³ *Toledo etc. R. Co. v. Rumbold*, 40 Ill. 143.

⁴ L. R. 5 Q. B. 226.

⁵ 20 & 21 Vict., c. 140.

⁶ L. R. 5 Q. B. 223.

⁷ L. R. 3 Q. B. 549.

⁸ 7 Hurl. & N. 987, 994, *ante*, p. 403.

⁹ *Supra*.

¹⁰ L. R. 6 Q. B. 266.

Notes.

cial opinion, said: "I feel bound to add for myself, and on behalf of several of the judges who have taken part in the hearing of this case, that, independently of the decision of *Great Western Railway Company v. Blake*,¹ where a railway company issues a ticket for a journey, in the course of which the train which conveys the passenger has to pass along a portion of the line of a railway belonging to another company (whether it be under running powers, or whether it be under any particular contract for a participation in profits, or otherwise), the contract between the railway company and the traveller to whom such ticket is issued is, upon every principle of the law, a contract not only that they will not themselves be guilty of any negligence, but that the passenger shall be carried with due and reasonable care along the whole line, from one end of the journey to the other."²

In this last case no reference was made by court or counsel to a decision in the Court of Exchequer, nearly three years previous, by the learned CHIEF BARON whose remarks we have just quoted. In this case,³ a train of the defendants, while stationary upon their own track, was run into by another train. Several railway companies had "running powers" over that part of the defendants' line on which the collision occurred, and no evidence was given as to whether the moving train belonged to, or was under the control of, the defendants. It was held, in the absence of evidence to the contrary, that it must be presumed that the train which caused the accident belonged to, or was under the control of, the defendants. The language, however, of KELLY, C. B., is noteworthy as suggesting a distinction upon which the case of *Thomas v. Rhymney Railway Company*⁴ might have been otherwise decided. "Either the train which caused the accident," said he, "belonged to the defendants, in which case, no doubt, they would be liable, or else the train belonged to some other company running on the defendants' railway under the authority or direction of the defendants. Supposing the latter alternative to be the true one, it lay on the defendants to show that the accident did not occur through any fault of theirs, but that it arose from a violation of the arrangements made by them with the company to which the train belonged,—a violation over which they had no control."⁵ Judgment was accordingly entered in this case for the plaintiff, but it seems that it would have been otherwise had it been shown that "the accident did not occur through any fault of theirs."

The suggestion thrown out in the last case seems to have been made the basis of the decision of the Court of Exchequer in the latest case in the English reports upon this subject,⁶ although no reference to this case appears in the report. A railway company had statutory authority⁷ to run over a portion of the defendants' line, paying a certain toll to the defendants. The signals at the point of junction between the two lines were under the control of the defendants. Owing to the servants of the first company negligently disobeying these signals, a train of this company ran into a train of the defendants, in which the plaintiff was, whereby he was injured. There was no negligence on the part of

¹ 7 Hurl. & N. 937; s. c. 31 L. J. (Exch.) 346, ante, p. 403.

² L. R. 6 Q. B. 273.

³ *Ayles v. South-Eastern R. Co.*, L. R. 3 Exch. 146.

⁴ L. R. 5 Q. B. 226; s. c. L. R. 6 Q. B. 266.

⁵ L. R. 3 Exch. 148.

⁶ *Wright v. Midland R. Co.*, L. R. 8 Exch. 137.

⁷ 28 & 29 Vict., c. 267

Parties to Action — Respondeat Superior.

any of the defendants' servants. In an action for the injuries sustained, brought by the plaintiff against his carrier, it was held that he was not entitled to recover. The decision in this case would seem to be obviously inconsistent with the conclusion reached by the Exchequer Chamber in the case of *Thomas v. Rhymney Railway Company*,¹ and it is to be regretted that the case was not appealed to that court. BRAMWELL, B., realizing the binding authority of this case, found it necessary to obviate its effect by "distinguishing" it from the case at bar. To do this it was necessary to presume the existence of a state of facts contrary to what appeared in both reports of the case, viz., negligence on the part of the defendants in that case. The case of *Thomas v. Rhymney Railway Company*, however, must be taken to be an accurate expression of the law of England upon this subject, until its authority is denied by a court of equal or higher dignity than the Exchequer Chamber.

§ 4. Parties to Action — Respondeat Superior. — It is sometimes an interesting question whether, in case of an injury from the negligence of other carriers than his own, the passenger will have a right of action against such other carrier. So far as cases of this kind are connected with the rule of imputed negligence, they have been considered at length in a former chapter.² But, aside from all considerations of imputed negligence, has the passenger a remedy against a carrier other than his own, whose negligence has caused him injury? This question has been mooted on several occasions when it was not necessary to decide it because the passenger had brought his action against his own carrier.³ The objection to the action by the passenger against any carrier other than his own, is the want of privity of contract between the parties in such a case. However true such an objection might be in a case of mere non-feasance on the part of such other carrier, it is obvious that the want of privity of contract between the parties cannot avail in an action on the case for a positive misfeasance.⁴

On principles unquestionably correct, it is held that if a railroad company receive upon its track the cars of another company, placing them under the control of its agents and servants, and drawing them by its locomotives over its own road to their place of destination, it assumes towards the passengers coming upon its road in such cars the relation of a common carrier of passengers, and all the liabilities incident to that relation.⁵ So, where the owners of a line

¹ L. R. 6 Q. B. 266; s. c. L. R. 5 Q. B. 226.

² *Ante*, Chap. VII.

³ Martin, B., in *Birkett v. Whitehaven Junction R. Co.*, 4 Hurl. & N. 730, 737; Crompton, J., in *Great Western R. Co. v. Blake*, 7 Hurl. & N. 987, 994; Bramwell, B., in *Wright v. Midland R. Co.*, L. R. 8 Exch. 137, 143; Bell, J., in *Murch v. Concord R. Co.*, 29 N. H. 9, 35.

⁴ See the illustration put by Bramwell, B., in *Wright v. Midland R. Co.*, L. R. 8 Exch. 137, 143. See also *New Orleans etc. R. Co. v. Bailey*, 40 Miss. 395; *Fletcher v. Boston etc. R. Co.*, 1 Allen, 9; *Illinois etc. R. Co. v. Kanouse*, 39 Ill. 272.

⁵ *Schopman v. Boston etc. R. Co.*, 9 Cush. 24; *Clymer v. Central R. Co.*, 5 Blatchf. 317; *Nashville etc. R. Co. v. Carroll*, 6 Heisk. 347. The agreement between the companies, in such a case, to allow the trains of each company to run and be drawn over their respective tracks for the mutual interest and convenience of both companies, charges each of the companies with a duty toward the servants of the other to keep their tracks in proper condition for this purpose, for a breach of which an action may be maintained by such servants injured thereby. *Nashville etc. R. Co. v. Carroll*, *supra*; *Sawyer v. Burlington etc. R. Co.*, 27 Vt. 370.

Notes.

of canal-boats engaged in the business of common carriers of passengers and goods, chartered one of their boats to another transportation company for a single trip, but retained charge of it and navigated it with their own master and crew, they were held liable to a passenger upon this trip for the loss of his goods.¹ Stage-coach proprietors running a line of coaches between two points, the route being divided between them into sections, the proprietor in charge of each section furnishing his own carriages and horses, hiring drivers and paying the expenses of his own section, each sharing in the profits of the entire line, have been held jointly liable as copartners to a passenger for a breach of the contract of carriage at any part of the route.² However, it has been held that if a passenger purchase a ticket of railway carrier A., by whose servants the train upon which he is riding is transferred to the line of carrier B., and thence by the servants of this carrier transferred to the line of carrier C., and while on this last line, but in the charge of the servants of carrier B., a collision ensues, attributable entirely to the fault of the servants of carrier B., this carrier alone can be held responsible for the injuries received by the passenger in such accident.³

A railroad company is also responsible for an injury to a person not a passenger, occasioned by want of proper care and prudence on the part of its servants in the management of a train which is under their exclusive care, direction, and control, although the train belongs to another company.⁴

In this connection, it may be stated that a railroad company will be liable for the acts of their lessees and others operating their road. The reason for this is very plain, as stated by REDFIELD, C. J.: "Unless we can hold the defendants thus liable, they might put their road into the hands of corporations or individuals of no responsibility. It was on this ground that the English courts denied the legality of one road leasing itself to another, or to private persons, and the consequent loss of security to the public, without consent of Parliament."⁵

¹ *Campbell v. Perkins*, 8 N. Y. 430.

² *Bostwick v. Champion*, 11 Wend. 571, 581, per Nelson, J. (s. c. affirmed in 18 Wend. 175, 181, per Chancellor Walworth); *Cole v. Goodwin*, 19 Wend. 251, 254.

³ *Clymer v. Central R. Co.*, 5 Blatchf. 317.

⁴ *Fletcher v. Boston etc. R. Co.*, 1 Allen, 9.

⁵ *Nelson v. Vermont etc. R. Co.*, 26 Vt. 717, 721, citing *Beman v. Rufford*, 1 Sim. (N. S.) 550; s. c. 15 Jur. 914; 20 L. J. (Ch.) 537; 6 Eng. Law & Eq. 106; *Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare, 306; s. c.

7 Eng. Rail. Cas. 643; 21 L. J. (Ch.) 837; 12 Eng. Law & Eq. 224; *Winch v. Birkenhead etc. R. Co.*, 5 De G. & Sm. 562; s. c. 16 Jur. 1035; 13 Eng. Law & Eq. 506. See also *Leshar v. Wabash Nav. Co.*, 14 Ill. 85; *Hinde v. Wabash Nav. Co.*, 15 Ill. 72; *Chicago etc. R. Co. v. McCarthy*, 20 Ill. 385; *Ohio etc. R. Co. v. Dunbar*, 20 Ill. 623; *Illinois etc. R. Co. v. Finnegan*, 21 Ill. 646; *Chicago etc. R. Co. v. Whipple*, 22 Ill. 105; *Wyman v. Penobscot etc. R. Co.*, 46 Me. 162; 2 *Thomp. on Neg.*, p. 904.

CHAPTER XIII.

LIABILITY OF CARRIER FOR DAMAGE TO PASSENGER THROUGH DEFAULT OF CONNECTING LINES.

- LEADING CASES: 1. *Candee v. Pennsylvania Railroad Company*.—The carrier who sells a ticket over connecting lines is held liable for the default of companies owning such lines.
2. *Quimby v. Vanderbilt*.—A modified rule—The liability to be determined by evidence of the contract of transportation.

- NOTES: § 1. Liability of the carrier who makes a contract for transportation over lines beyond his own.
2. Another view—A through ticket a distinct contract of each carrier.
3. Liability of the carrier on whose line the injury or loss occurs.
4. Partnership of carriers.
5. Limitation of the carrier's liability for losses and injuries occurring off his own line, by contract and notice.
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1. THE CARRIER WHO SELLS A TICKET OVER CONNECTING LINES IS HELD LIABLE FOR THE DEFAULTS OF COMPANIES OWNING SUCH LINES.

CANDEE *v.* PENNSYLVANIA RAILROAD COMPANY.*

Supreme Court of Wisconsin, 1867.

Hon. LUTHER S. DIXON, *Chief Justice*.

“ ORSAMUS COLE, }
“ JASON DOWNER, } *Judges.*

The Rule of Liability for Damage upon a Connecting Line.—Where a railroad company sells a through passenger-ticket by a specified route to some point out of the State, over lines of road belonging to other companies in other States, the undertaking of the first-named company is to transport the passenger and his baggage safely to such place of destination, and it is liable to him for any injury to his person or baggage occurring on any of said connected lines of road in violation of such undertaking.

* Reported, 21 Wis. 582.

Candee v. Pennsylvania Railroad Company.

APPEAL from the Circuit Court for Milwaukee County.

Action for damages resulting from the opening of plaintiff's trunk and the taking of goods therefrom while the same was being carried, with the plaintiff herself, from Harrisburg, Pennsylvania, to the city of New York. Defendant appealed from an order overruling a demurrer to the complaint as not stating a cause of action, and also for a defect of parties defendant in that the other railroad companies named in the complaint were not made defendants. The substance of the complaint is stated in the opinion. It appears therefrom, also, that defendant's railroad extends from the city of Pittsburgh to the city of Philadelphia in the State of Pennsylvania.

Byron Paine, for appellant; *Alfred L. Cary*, for respondent.

COLE, J. — Since this case comes up on a demurrer to the complaint, it may be well to give the principal allegations of the complaint, to see if they show a cause of action against the defendant.

It is alleged in the complaint that the several railroad companies therein mentioned formed one continuous and connecting line of road for the transportation of passengers and baggage from the city of Milwaukee to the city of New York; that by virtue of an arrangement existing between these companies, each company issued and sold tickets for the transportation of passengers and baggage, which were good over the roads of the other companies; that at the city of Harrisburg there is a railroad branching off from the defendant's road and running to New York by the way of Allentown, and commonly known as the "Allentown Line;" that by reason of some arrangement existing between the defendant and the operators of the "Allentown Line," tickets for the transportation of passengers and baggage over the defendant's road were equally good over the "Allentown Line." It is further alleged that about the 22d of February, 1865, the plaintiff purchased from the Chicago and Milwaukee Railway Company a coupon ticket issued by that company, paying therefor the then established rate for one first-class passage from Milwaukee to the city of New York; that she had the option of using her ticket over the "Allentown Line," instead of going by the way of Philadelphia; that she delivered her trunk to the Chicago and Milwaukee Company at Milwaukee, receiving therefor a through check for the trunk to the city of New York by way of the "Allentown Line." It is further averred that when the plaintiff arrived at the city of Harrisburg on the defendant's road, where the "Allentown Line" branches off, she determined to go by the way of Philadelphia, instead of going over the "Allentown Line;" that thereupon the defendant company took up the check which the plaintiff had received

Supreme Court of Wisconsin.

for her trunk from the Chicago and Milwaukee Company, and gave in exchange therefor a through check from Harrisburg to New York by the way of Philadelphia. It is stated that at the time the trunk was re-checked at Harrisburg, the plaintiff was informed and believed that the same was in good order, but that when it arrived at New York, the lock had been broken and the articles there mentioned had been taken therefrom. It is not, however, alleged that the defendant company was guilty of any negligence on its part in transporting the trunk over its road, nor that the loss happened while the trunk was in the possession of that company, or under the control of its agents and employees. The question therefore arises, upon these facts, whether a cause of action is stated against the defendant.

It appears to us that there is not enough set forth to show that the defendant is liable for the value of the articles lost. According to our understanding of the matter, the ticket and check given by the Chicago and Milwaukee Railway Company imply a special understanding by that company to safely transport and carry, or cause to be safely transported and carried, the plaintiff and her baggage over the roads mentioned in the complaint, from Milwaukee to the city of New York. This, we think, must in legal contemplation be the nature and extent of the contract entered into and assumed by that company when it sold the plaintiff the through ticket, gave a through check for the trunk, and received the fare for the entire route. This is the doctrine of the case of *Illinois Central Railroad Company v. Copeland*,¹ and we are disposed to follow it as laying down a safe, sound, and reasonable rule on this subject. In the case of *Peet v. Chicago and North-Western Railway Company*² this court affirmed an analogous principle, by holding that where a railroad company contracted as a carrier to transport goods for the whole line, it became liable for any injury which might happen to them beyond the terminus of its own road, while under the control of other carriers. So, here, the Chicago and Milwaukee Company received the whole passage-money from Milwaukee to New York city,—fare which covered the carriage of both the plaintiff and her baggage safely to the latter city. It assumed to give a through check for the trunk, and a through ticket which entitled the holder to a first-class seat in the cars passing over the successive roads. It seems to us, therefore, perfectly reasonable and proper to hold that company to the full measure of liability assumed by it in its contract, and to say that it is liable for losses happening beyond the line of its own road. It was contended by the counsel for the appellant that the facts do not

¹ 24 Ill. 332.² 19 Wis. 118.

Candee v. Pennsylvania Railroad Company.

show even a contract on the part of the Chicago and Milwaukee Company to transport the plaintiff and her baggage for the entire route; that the tickets issued by it should rather be regarded as distinct tickets for each road, sold by that company merely as agent for the other companies; and that each company is only liable for such losses as happen on its own road. But it is very obvious that this rule would at once destroy all the convenience and benefits of the through-ticket system, since it would impose upon the passenger the necessity of both looking after and examining the condition of his baggage at the terminus of each road; otherwise it would be impossible for him to prove where the loss occurred. We deem it a better rule to hold that the Chicago and Milwaukee Company, by issuing the through ticket and check, contracted to carry the plaintiff and her baggage the entire route. Had the complaint alleged that the loss happened in consequence of the negligence of the agents and employees of the defendant company, and while the trunk was being transported over its road, then, perhaps, the action might be maintained notwithstanding the undertaking of the first company. But there is no such averment in the complaint.

It seems to have been supposed that the defendant company rendered itself liable for the loss in this case because at Harrisburg it took the baggage-check originally given by the Chicago and Milwaukee Company and gave its own through check for the trunk to New York by the way of Philadelphia. But this exchange was made simply in accordance with the terms of the contract entered into at Milwaukee. By that contract the plaintiff had the option of using her ticket over the "Allentown Line," or to go by the way of Philadelphia. True, her trunk had been checked by the way of Allentown, yet when she reached Harrisburg she had the privilege of electing whether she would pass over the "Allentown Line" or go the other route. She contracted for this option in the first instance, and, therefore, surrendering the check which she had received from the Chicago and Milwaukee Company, and taking the defendant's check in exchange, was but carrying out this undertaking and agreement. But we do not think the effect of this transaction was to change the relation of the parties, by either restricting or enlarging the liability of the defendant company, any more than though the trunk had been originally checked by the Philadelphia route.

In anticipation that we might hold, upon the facts stated in the complaint, that the defendant contracted to carry the plaintiff's trunk beyond its own road to the city of New York, the counsel for the appellant contends that the defendant had no power to make such a contract. This objection, that a railroad company cannot incur liability beyond

 Court of Appeals of New York.

its own route by an express contract, is overruled by what has been already said in this opinion, as well as by what (if not expressly) is at least by implication decided in *Peet v. Chicago and North-Western Railway Company*.¹ It is unnecessary to enter upon any discussion of this question at this time. The remarks already made dispose of this appeal. My own opinion, however, is that the great weight of authority, not only in England but in this country, holds that it is competent for a railroad company to contract for the transportation of passengers and goods beyond the terminus of its road, and I am disposed to follow these decisions. But I leave the discussion here for the present.

It follows from the views we have expressed, that the order of the Circuit Court overruling the demurrer to the complaint must be reversed, and the cause remanded for further proceedings according to law.

DOWNER, J. — I concur in the opinion that the defendant corporation is not liable unless the loss occurred while the baggage was in its custody; and as there is no averment in the complaint to that effect, the demurrer should have been sustained. But I express no opinion as to the liability of the corporation issuing the ticket, for losses on the roads of the other corporations.

Order reversed and cause remanded.

2. A MODIFIED RULE — THIS LIABILITY TO BE DETERMINED BY EVIDENCE OF THE CONTRACT OF TRANSPORTATION.

QUIMBY v. VANDERBILT.*

Court of Appeals of New York, 1858.

Hon. ALEXANDER S. JOHNSON, *Chief Justice.*

" GEORGE F. COMSTOCK,	}	<i>Judges.</i>
" SAMUEL L. SELDEN,		
" HIRAM DENIO,		
" JAMES J. ROOSEVELT,	}	<i>Justices of the Supreme Court and ex-officio Judges of the Court of Appeals.</i>
" IRA HARRIS,		
" DANIEL PRATT,		
" THERON R. STRONG,		

1. The Rule of Liability for Damages upon a Connecting Line. — An owner of one of several lines for the transportation of passengers, running in connection over different

* Reported, 17 N. Y. 306.

¹ *Supra.*

Quimby v. Vanderbilt.

routes, may contract as principal for the conveyance of a passenger over the whole route. Whether he does so contract is a matter to be determined by evidence. He may, however, specially exempt himself from liability for the defaults of other carriers. A contract by the first carrier for transportation over other lines, at his risk, may be established by circumstances, notwithstanding the passenger receives tickets for the different lines, signed by their separate agents.

2. **What the Ticket is.**—Passage-tickets are generally to be regarded as tokens rather than contracts, and are not within the rule excluding parol evidence to vary a written agreement.
3. **The Case stated.**—The defendant was the owner of steamships sailing between New York and the eastern port of the transit route across the Isthmus of Nicaragua. He was also part-owner of steamships forming part of a line sailing between the western port of the transit route and San Francisco. He was furnished by the corporation owning and managing the transit route with passage-tickets for the conveyance of persons across the isthmus by their steamboats and carriages, which he sold to passengers who embarked in his steamships from New York, and returned those unsold. But the defendant owned no interest in this transit route, nor was he an agent of it, or employed by it in any way. Upon the door of the office at New York, occupied by one Allen, the defendant's agent, and which he frequently visited, was posted an advertisement headed, "Vanderbilt's line between New York and San Francisco," and signed "Allen, agent," in which the route by the steamships on both oceans and across the isthmus was described and commended. The agent at that office sold to the plaintiff, for a gross sum, three tickets, which severally imported that he was entitled to be carried to and across the isthmus, and thence upon a particular vessel on her next voyage to San Francisco, and delivered to him a card, signed by himself, describing the route, and stating that passengers are speedily conveyed across the isthmus by the Nicaragua transit. The plaintiff was, however, a long time delayed upon this transit route, and failed to reach the Pacific terminus until the vessel in which he had secured passage had sailed. Not being provided with other means of transportation, he was obliged to return to New York, after long delay in a sickly climate and consequent injury to his health. It was held that the foregoing was sufficient to authorize a jury to find that the defendant contracted as principal for the prompt conveyance of the plaintiff across the isthmus, and to charge him with the damages resulting from detention.

THE plaintiff sued the defendant in the New York Common Pleas, and complained that shortly prior to the 5th of March, 1852, the defendant, being a carrier of passengers between New York and California, undertook, in consideration of \$250 paid by the plaintiff, to carry him from New York to San Francisco by the route across the Isthmus of Nicaragua, and that such passage, on the Pacific coast of the continent, should be in the second cabin of the steamship Independence, on her then next voyage to San Francisco; that, pursuant to the contract, the plaintiff was carried to the port of San Juan de Nicaragua, on the Atlantic side of the isthmus, but the defendant neglected to provide for his conveyance across, on account of which he was delayed a long time; and when he finally arrived at San Juan del Sur, on the Pacific side, the Independence had sailed, and the defendant neglected to furnish any means for the continuance of the plaintiff's journey; whereby he was forced to return to New York at his own expense, after being exposed for a considerable time to the sickly climate of the isthmus, to the injury of his health, etc.

Court of Appeals of New York.

The answer denied the contract stated, but admitted an agreement by which the defendant, as the owner of a line of steamships between New York and Nicaragua, undertook to carry the plaintiff to the latter point; and it alleged that the plaintiff contracted with the "Accessory Transit Company of Nicaragua" for his passage across the isthmus, and with Robert & G. L. Schuyler, the owners of a steamship on the Pacific coast, for his passage by water from the western side of the isthmus to San Francisco; that one Daniel B. Allen, acting separately as the agent for those several lines, furnished the plaintiff with separate tickets, at the price of \$90 for the Atlantic passage, \$35 for that across the isthmus, and \$125 for that on the Pacific line. The other material allegations of the complaint were put in issue.

On the trial in the Common Pleas, the plaintiff proved that he went to an office situated at Battery Place, New York, and inquired the price of a through ticket to San Francisco, and whether there would be any delay; he was told that the price was \$250, and that he would not be delayed over two or three days; that he thereupon made an agreement with D. B. Allen, the person in charge of the office, who is a son-in-law of the defendant, for his passage to San Francisco for \$250; that his name was taken down, and he was allowed to select his berth in the steamships. Allen gave him a card and three tickets; the card was in these words:—

"VANDERBILT'S LINE FOR CALIFORNIA, VIA NICARAGUA. — Nearly 1,000 miles shorter than any other route. Composed of the new first-class steamships Northern Light, Prometheus, Daniel Webster; connecting by the Nicaragua transit route, having but twelve miles of land carriage, by which passengers are speedily and comfortably conveyed through a beautiful and healthful country, with the steamers North America, Pacific, Independence, S. S. Lewis, one of which will leave San Juan del Sur, the Pacific terminus of the transit route, with the passengers for San Francisco without delay.

"N. B. — Travellers to the golden region are cautioned against the misrepresentations of those in the service of rival lines. They are solicited to call at the only office of this line, No. 9 Battery Place (upstairs), where full and correct information may be obtained, and where, only, passages may be secured.

D. B. ALLEN, *Agent*."

Two of the tickets were for the steamships, and both these were headed "Vanderbilt's Line." One stated the plaintiff had paid his passage in the steamship Prometheus on her next voyage from New York to San Juan de Nicaragua, and the other that he had paid his passage in the steamship Independence on her next voyage from San Juan del

Quimby v. Vanderbilt.

Sur to San Francisco. They were signed, "D. B. Allen, agent, per J. Rintoul." The other ticket stated that the plaintiff was entitled to a passage across the Isthmus of Nicaragua by the line of the "Accessory Transit Company," and it was signed "Isaac C. Lea, secretary."

The evidence to connect the defendant with the office where this transaction took place, and its business, was as follows: He owned the vessels on the Atlantic side, including the *Prometheus*, and D. B. Allen was his agent to manage the business which was transacted by means of them. Allen was also the agent for, and had the general control and management of, the line through to San Francisco. There were two apartments, the business office and the private office of Allen, in the latter of which the defendant had a desk, and the usual entrance to the inner or private office was through the other. The defendant was at the office sometimes two or three times a day, but he was not there every day. He was consulted by Allen about the affairs of the line, and the witness, who was employed in the business upon the isthmus, swore that the defendant was the chief manager of the line, and that Allen was the principal agent. There was an advertisement published by Allen in the daily papers in New York, and posted on a board at the door of the office, and which was read by the plaintiff when he came to engage his passage, as follows:—

"VANDERBILT'S NEW LINE BETWEEN NEW YORK AND SAN FRANCISCO — THE ONLY THROUGH LINE VIA NICARAGUA. — A number of days shorter than any other route. Composed of the following first-class steamships between New York and San Juan de Nicaragua: *Prometheus*, Captain Churchill; *Daniel Webster*, Captain Baldwin. And between San Juan del Sur and San Francisco: *North America*, Captain Blethen; *Pacific*, Captain Jarvis; *Independence*, Captain Wakeman.

"These steamers are all new, were built expressly for this route, and for speed, safety, and accommodations are unsurpassed. From San Juan de Nicaragua to San Juan del Sur, passengers will be promptly conveyed over the new transit route of the Nicaragua company, having but twelve miles of land transportation, and at that point embark in one of the above-named Pacific steamers for San Francisco.

"The great saving of distance by this route over others heretofore established, and a speedy and comfortable transit between the two oceans, through a beautiful and healthful country, offer inducements to the travelling public equalled by no other line.

"D. B. ALLEN."

The Accessory Company is a corporation created by the laws of the State of Nicaragua, in Central America, but the corporators or stock-

Court of Appeals of New York.

holders are residents of the city of New York, and the defendant is one of them. It has a president and board of directors and other officers. This company had no interest in the steamships, nor (as the secretary swore) any thing to do with them. Its business was to transport passengers from one sea to the other. So far as it issued passage-tickets in New York, they were, as a general thing, delivered to the defendant before the sailing of each steamship, he ordering such number as he wanted; and a day or two after the ship sailed he would pay for so many as he had sold, at \$35 each, and return the rest. If other persons bought tickets of the company, which was not usual, they paid \$40 each.

One W. H. Brown was the general owner of the steamship Independence, but at the time of this transaction R. & G. L. Schuyler had an absolute title in form to her, as mortgagees, and they were, as R. Schuyler swore, mortgagees in possession. She was run as one of the ships of the line from New York to California, under a contract originally made with Brown, which was continued by the Schuylers after they had acquired the title. They had nothing to do with her direction, management, or expenses; these matters being under the charge of Allen, who was the agent of the Schuylers, and accounted to them for the clear profits, after paying expenses and deducting a commission to himself. Robert Schuyler swore that he wanted to withdraw this vessel from the line, and had so told the defendant, and the defendant had agreed that she might be withdrawn as soon as she could be spared. The other ships on the Pacific side, viz., the North America and Pacific, were owned, one-half of each by the defendant, and the other half by other parties. Allen swore positively that the route across the isthmus was not a part of the line, and that neither he (the witness) nor the defendant had any thing to do with that part of the route, except to sell the tickets of the Accessory Transit Company; and Mr. Lea, the secretary of the company, swore that Allen was not its agent. Allen, however, admitted that when persons applied for passage to California by his line, they were charged by him the gross sum of \$250, and were not informed as to the distribution of that sum among the proprietors of the several routes.

It appeared that the plaintiff sailed from New York in the Prometheus on the 5th and arrived at Nicaragua on the 15th of March. No means were provided for taking him across the isthmus, and he was obliged to remain there more than a week, when he embarked in a vessel going up the river. At Castillo Rapids he ascertained that the Independence had sailed for San Francisco. When he arrived at the

Quimby v. Vanderbilt.

port on the Pacific side, there was no vessel to take him on; and although the company sent off two other steamers while he was there, he was not permitted to embark on board either of them. He finally found his way back to San Juan de Nicaragua, and from thence obtained a passage to New York at his own expense. A steamer of the line, running on the Pacific side, had been lost shortly before this time, and this was the reason why the company could not take on all the passengers arriving after the Independence had sailed.

The defendant's counsel maintained that there was not evidence sufficient to be submitted to the jury of a contract by the defendant to carry the plaintiff through to San Francisco, and requested that the judge would charge to that effect; but he declined so to charge, and submitted the question to the jury whether such a contract had been proved. The defendant's counsel excepted. Verdict for the plaintiff for \$625. After an affirmance at General Term, the defendant appealed here. Several other exceptions were taken on the trial in the Common Pleas which were not relied on here.

C. A. Rapello, for the appellant; *Richard Goodman*, for the respondent.

DENIO, J. — The plaintiff relies upon an express contract, by which, as he alleges, the defendant engaged to cause him to be carried from New York to San Francisco; and the single question of law involved in the case is whether there was evidence of such a contract proper to be submitted to the jury. If it should be conceded that there was no such connection between the three lines of transportation as would entitle the defendant, as the representative of the whole, to contract in their behalf for the carriage of persons and property the entire distance from New York to California, it was quite competent for him to bind himself to the plaintiff by an express contract not only to carry him over his own proper portion of the line, but that the other transportation companies should successively take him up, upon his arrival at the commencement of their respective routes, and carry him over the same until he should arrive at his destination at San Francisco. The English courts hold that where property is embarked upon a railroad or other line of transportation, addressed to a place beyond the terminns of the line, but which may be reached by other lines of carriage running in connection with it, a contract arises between the first-mentioned company and the owner of the property that it shall be carried to its place of destination;¹ and this court has determined that the agent of a rail-

¹ *Muschamp v. Lancaster etc. R. Co.*, 8 Mee. & W. 421; *Watson v. Ambergate etc. R. Co.*, 3 Eng. Law & Eq. 497.

Court of Appeals of New York.

way company may bind his principals by a contract for carriage over other roads running in connection with his own.¹ The late Court of Errors, in my opinion, very wisely limited the English rule above mentioned, by holding that evidence was admissible to show that by the course of business a transportation line receiving property without any express contract undertook only to carry it over its own line, and then place it in the hands of the carriers over the next route; and that it discharged its obligation to the owners by delivering it to a responsible company next in order in its passage to the place of destination.² All the cases assume that the company to which the goods are delivered may lawfully contract for the performance of the other lines running in connection with its own, as well as for its proper route; and there is no difference in principle, in this respect, between contracts for the carriage of persons and for the transportation of property.

But the defendant's counsel contends that the tickets which the plaintiff received for the passage over the several routes are, in themselves, written evidence of the bargains by which he engaged his passage, and that he is precluded from contradicting them by parol testimony of an entire contract with the defendant. We do not think this a sound position. The tickets do not purport to be contracts. They are rather in the nature of receipts for the separate portions of the passage-money; and their office is to serve as tokens to enable the persons having charge of the vessels and carriages of the companies to recognize the bearers as parties who were entitled to be received on board. They are quite consistent with a more special bargain. Being the usual permits which are issued for the guidance of the masters of the vessels and the conductors of the carriages, they would necessarily be given to the passenger to facilitate the transaction of business, whatever the nature of his arrangement for passage may have been. Their character as mere tokens is shown by the fact that the defendant received them in large numbers from the Transit Company, not as an agent of that company for the purpose of making bargains in its behalf with others, but to furnish them to persons with whom he expected to deal on his own account. In *Hart v. Rensselaer and Saratoga Railroad Company*, just referred to, the plaintiff had separate tickets for each of the roads over which she travelled, but she was permitted to recover against one of the companies, though unable to show that her baggage was lost on the route of that company. We do not say that the receiving of sep-

¹ *Hart v. Rensselaer etc. R. Co.*, 8 N. Y. 37.

² *Van Santvoord v. St. John*, 6 Hill, 157.

Quimby v. Vanderbilt.

arate tickets for the different lines is not evidence of some weight upon the question whether the contract was entire, but we hold that it does not come within the rule which excludes parol testimony respecting a contract which has been reduced to writing.

There was positive evidence of a verbal contract between the plaintiff and Allen for carrying the former from New York to San Francisco. The plaintiff applied at the office to obtain such passage, and he was promised it for \$250. The tickets were then given him to secure his admission to the different vehicles of the line. In this, Allen professed to act as the agent or clerk of some one. So far as the steamships on the Atlantic were concerned, he was the agent of the defendant, and no question is made but that he was authorized to bind the defendant thus far. It is equally clear to my mind that he was authorized to bind him by contracts for carrying passengers across the isthmus. The Transit Company did not, as a general thing, sell any tickets to travellers, nor did they make any contracts for passage except with the defendant. To him they sold tickets, in the nature of permits for passage over their route, in such quantities as he chose to purchase. It is proved that neither he nor Allen were agents for the Transit Company. When he dealt with a traveller, therefore, he bargained on his own account, and not on behalf of the Transit Company. He might have charged more or less than he paid that company. It was certainly possible for him to dispose of one of these permits by an arrangement with the passenger, so special that the latter should have no recourse to him; but if he engaged, in terms, that the purchaser should be carried across the isthmus, and gave him one of the Transit Company's tickets to show his title to be admitted on board their boats and carriages, he was the principal in that contract, and must answer for its breach. He placed these tickets in the hands of Allen, who was accustomed to deliver them to passengers in connection with such contracts as the one he made with the plaintiff. Allen admitted, on his examination, that he charged the gross sum of \$250 for the entire passage, without any specification of the amount belonging to the separate branches of the line; and there is not the slightest evidence that on any occasion he sold the tickets to be taken at the risk of the passenger, or in connection with any arrangement except such as I have mentioned. The facts that the defendant purchased the tickets of the Transit Company; that he placed them in the hands of his agent, Allen, for delivery to passengers; that the latter was accustomed to dispose of them in connection with contracts for passage over the entire route; and that he transacted the business, in an

Liability of the Carrier issuing the Ticket.

office occupied also by the defendant, and acted under his general direction, were sufficient, *primâ facie*, to charge the defendant as principal in these contracts.

As the detention which prevented the plaintiff from reaching the steamship Independence before she sailed occurred upon the isthmus, the defendant is chargeable in this action when it is shown that such detention was a breach of his contract, even though it should be held that the plaintiff contracted with other parties for his passage upon the Pacific coast. But I think there was sufficient evidence to enable the jury to find that the defendant was the principal in the contract which Allen made with the plaintiff for the entire passage. The terms of the card which was given to the plaintiff when he received his ticket, and of the advertisement which was posted at the door of the office, which the plaintiff read when he went to secure his passage, looked to contracts for the whole distance. The defendant's connection with the office and with Allen was sufficient, *primâ facie*, to charge him with a knowledge of the contents of these papers, and he is to be looked upon as their author. Being known to both parties to the contract for passage, they afford the means of ascertaining what that contract was, if it were otherwise equivocal. If we add to this evidence the fact that the defendant was the owner of a moiety of two of the steamships which ran on the Pacific side, and that he was a party to the arrangement by which the Independence, owned substantially by the Schuylers, was employed in that navigation in connection with the other routes, a case was made out which was not only suitable for the consideration of the jury, but which in our opinion fully warranted the verdict which they gave.

The judgment of the Court of Common Pleas should be affirmed.

All the judges concurring.

Judgment affirmed.

NOTES.

§ 1. Liability of the Carrier who makes a Contract for Transportation over Lines beyond his own. — It is a very general custom in this country, as well as in England, for carriers to enter into combinations by virtue of which one of them can make contracts for transportation over the lines of the others and issue tickets which will be recognized by their servants. From this practice a number of interesting questions have arisen, some of them very difficult of solution. The weight of authority is, that if a carrier undertakes to carry a passen-

Notes.

ger and his baggage to a certain destination, he is responsible for his safety and that of his baggage, as carrier, throughout the whole distance, whether the franchise and means of conveyance where the injury or loss occurs be owned or controlled by him or by some other carrier. The terms of his contract are to carry the passenger through, and the law holds him to a performance of it, notwithstanding the intervention of another carrier as a means of effecting such a performance.¹ In several well-considered cases it has been held that the issuing of a ticket over other roads is in itself sufficient evidence that the carrier so doing undertakes to carry the passenger and his baggage through to the terminus indicated upon the ticket.² A passage-ticket, however, is not a contract, but rather a mere token to indicate that the passenger has paid his fare.³ Therefore, where two tickets had been issued to a passenger from New York to San Francisco *viâ* the Isthmus of Panama, — one from New York to Chagres, and the other from Panama to San Francisco, — parole evidence was held to be admissible to show that there was one entire contract for carriage.⁴

In Tennessee, it is held that a carrier may bind himself by a contract for transportation over a route composed of several lines, and make himself responsible for safe carriage over the entire route; but that this will not be considered to be conclusively established from the sale of the ticket alone.⁵

It has been frequently urged in those instances where the carrier is a corporation, as is usually the case in this country at the present time, that a contract for carriage over a route beyond the terminus of the carrier's own line is *ultra vires*. This view has not, however, met with much favor from the courts. In California, it was held that railroad companies can make valid contracts for the carriage of persons and baggage beyond their own lines, by land or by water, and thus become liable for the conduct of carriers in no wise under their control.⁶ Elsewhere such contracts have been held valid although the proposed line of travel extends beyond the territorial limits of the State within which the carrier making the contract is incorporated.⁷ In a very well considered case

¹ Illinois etc. R. Co. v. Copeland, 24 Ill. 337; Kent v. Midland R. Co., L. R. 10 Q. B. 1; s. c. 44 L. J. (Q. B.) 18; 31 L. T. (N. S.) 430; 23 Week. Rep. 25; Najac v. Boston etc. R. Co., 7 Allen, 329; Wilson v. Chesapeake etc. R. Co., 21 Gratt. 654; Ward v. Vanderbilt, 4 Abb. App. Dec. 521; Williams v. Vanderbilt, 28 N. Y. 217; s. c. 29 Barb. 491; Quimby v. Vanderbilt, *ante*, p. 423; Great Western R. Co. v. Blake, 7 Hurl. & N. 986; s. c. 8 Jur. (N. S.) 1013; 31 L. J. (Exch.) 346; *ante*, p. 403; Hart v. Rensselaer etc. R. Co., 8 N. Y. 37; Weed v. Saratoga etc. R. Co., 19 Wend. 534; Candee v. Pennsylvania R. Co., *ante*, p. 419; Carter v. Peck, 4 Sneed, 203.

² Illinois etc. R. Co. v. Copeland, 24 Ill. 337; Kent v. Midland R. Co., L. R. 10 Q. B. 1;

s. c. 44 L. J. (Q. B.) 18; 31 L. T. (N. S.) 430; 23 Week. Rep. 25; Najac v. Boston etc. R. Co., 7 Allen, 329; Wilson v. Chesapeake R. Co., 21 Gratt. 654; Great Western R. Co. v. Blake, 7 Hurl. & N. 986; s. c. 8 Jur. (N. S.) 1013; 31 L. J. (Exch.) 346; *ante*, p. 403; Cary v. Cleveland etc. R. Co., 29 Barb. 35; Hart v. Rensselaer etc. R. Co., 8 N. Y. 37; Weed v. Saratoga etc. R. Co., 19 Wend. 534; Candee v. Pennsylvania R. Co., *ante*, p. 419; Carter v. Peck, 4 Sneed, 203.

³ Quimby v. Vanderbilt, *ante*, p. 423.

⁴ Van Buskirk v. Roberts, 31 N. Y. 661. See also Williams v. Vanderbilt, 28 N. Y. 217; s. c. 29 Barb. 491; Quimby v. Vanderbilt, 17 N. Y. 306, *ante*, p. 423; Ward v. Vanderbilt, 4 Abb. App. Dec. 521.

⁵ Nashville etc. R. Co. v. Sprayberry, 9 Heisk. 852; s. c. 1 Cent. L. J. 541.

⁶ Wheeler v. San Francisco etc. R. Co., 31 Cal. 46.

⁷ Cary v. Cleveland etc. R. Co., 29 Barb.

Through Ticket a Contract of each Carrier.

before the Court of Appeals of New York, COMSTOCK, C. J., said that the plea of *ultra vires*, according to its just meaning, imports, not that the corporation could not, and did not in fact, make the unauthorized contract, but that it ought not to have made it. Such a defence, therefore, necessarily rests upon the violation of trust or duty toward the shareholders, and is not to be entertained where its allowance will do a greater wrong to innocent third parties. The acquiescence of the shareholders in the abuse will prevent the interposition of such a plea.¹

The fact that at some point on the passenger's journey his baggage is rechecked will not operate as a new contract for its carriage from that point. It must be considered to have been done in pursuance of the original undertaking.² Nor can a carrier making such a contract for carriage beyond his own line free himself from liability by showing an agreement between the various carriers whose lines constitute the route, that each shall be responsible for losses and injuries occurring on his part of the line.³

Where the contract for carriage on the route is entire, the liability of the carrier making it is in nowise affected by the knowledge of the plaintiff of the distinct ownership of the connecting lines.⁴

§ 2. Another View—A Through Ticket a Distinct Contract of each Carrier.—The foregoing view, however, has not universally prevailed. There is very respectable authority for the rule that a through ticket over several distinct lines of passenger transportation, issued in the form of several tickets on one piece of paper, and recognized by the proprietors of each line, is to be regarded as a distinct ticket for each line; that the rights of the passenger purchasing such a ticket, and the liabilities of the proprietors of the several lines recognizing its validity, are the same as if the purchase had been made at the ticket-office of each line respectively.⁵ "The theory that the company selling the ticket shall be held, from this alone, to have actually contracted to carry the passengers over roads besides its own, and that the owners of the other roads are but the agents of the first to carry out the contract, seems to us to be an arbitrary assumption, a sort of legal fiction, and contrary, in some cases at least, to the truth of the case. Assuming that in fact the different lines of road are separate and distinct, and owned and controlled by different companies with different agents and officers, and that there is no contract or privity between them in regard to carrying passengers except the arrangement to sell through tickets, and that these facts appear in proof, shall the fact that the first company, with the authority of the others, issues and sells the tickets, be held of itself to establish exactly what may be contrary to the truth, that the other companies are but the agents and servants of the first?"⁶ A similar rule obtains in Connecticut. The de-

35; *Candee v. Pennsylvania R. Co.*, ante, p. 419; *Nashville etc. R. Co. v. Sprayberry*, 9 Heisk. 852; s. c. 1 Cent. L. J. 541.

¹ *Bissell v. Michigan etc. R. Co.*, 22 N. Y. 258; *Buffett v. Troy etc. R. Co.*, 40 N. Y. 168.

² *Candee v. Pennsylvania R. Co.*, 21 Wis. 532, ante, p. 419. See also *Wilson v. Chesapeake etc. R. Co.*, 21 Gratt. 654.

³ *Wilson v. Chesapeake etc. R. Co.*, 21 Gratt. 654.

⁴ *Carter v. Peck*, 4 Sneed, 203.

⁵ *Knight v. Portland etc. R. Co.*, 56 Me. 235; *Furstenheim v. Memphis etc. R. Co.*, 9 Heisk. 238; *Nashville etc. R. Co. v. Sprayberry*, 9 Heisk. 852; s. c. 1 Cent. L. J. 541; *Hood v. New York etc. R. Co.*, 22 Conn. 1.

⁶ *McFarland, J.*, in *Nashville etc. R. Co. v. Sprayberry*, 9 Heisk. 852, 853; s. c. 1 Cent. L. J. 541.

Notes.

defendant, a railroad company, sold a through ticket from New Haven to Collinsville. Their road extended no further than Farmington, which was five miles distant from Collinsville. From Farmington to Collinsville, passengers were carried by a line of stages, in one of which the injury complained of happened. The railroad company advertised that the stages connected with the trains at Farmington. The whole fare from New Haven to Collinsville was generally paid to the railroad company, and the conductor's through checks were honored by the stage line. The stage managers, too, sold tickets through from Collinsville to New Haven, which were honored on the defendant's train and taken up. Once a month, accounts were settled between the two lines. The court held this insufficient evidence of an undertaking on the part of the defendant to carry the plaintiff through to Collinsville.¹ A case in Michigan tends to support the foregoing, though not exactly in point. There, a ticket from Buffalo to Detroit, in two parts, — one from Buffalo to Stratford in Canada, and the other from Stratford to Detroit, — printed on the same piece of paper, in coupon form, was held to form two separate and distinct contracts and vouchers for separate journeys. Therefore a delay at Stratford of two months, before using the second ticket, was held not to affect the validity of such ticket.²

3. **Liability of the Carrier on whose Line the Injury or Loss occurs.**— Whatever may be the correct rule concerning the liability of the company selling a through ticket over several lines of carriers, there would seem, on principle to be no doubt about the responsibility of one of the intervening carriers for an injury received upon its line, caused by the negligence of its servants.³ The contract created between a railroad company and a purchaser of one of its tickets, and the rights and liabilities of the parties to such contract, are the same, whether the ticket is purchased at one of the company's stations, or at a station of a contiguous railroad, or of any other authorized agent of the company.⁴

With regard to baggage, there can be no doubt that it is necessary for the plaintiff to show that it came into the hands of the particular carrier whom he wishes to charge with a liability for its loss.⁵ What is sufficient evidence to show that the baggage came into the possession of the carrier must to a very great extent depend upon the facts of each case. Proof that a passenger riding on a through ticket from New York City to Junction City, Kansas, by way of the Hannibal and St. Joseph Railroad and the Kansas Pacific Railway, delivered at Kansas City to the baggage-master of the Kansas Pacific Railway Company, who was the agent of both railroad companies, certain checks of the Hannibal and St. Joseph Railroad for baggage belonging to him, with the understanding that it should be forwarded from Kansas City to Junction City by the Kansas Pacific Railway, was considered some evidence to show that the Kansas Pacific

¹ *Hood v. New York etc. R. Co.*, 22 Conn. 1.

² *Brooke v. Grand Trunk R. Co.*, 15 Mich. 332. See also *Kessler v. New York etc. R. Co.*, 61 N. Y. 538; s. c. 7 Lans. 62.

³ *Johnson v. West Chester etc. R. Co.*, 70 Pa. St. 357; *Schopman v. Boston etc. R. Co.*, 9 Cush. 24.

⁴ *Schopman v. Boston etc. R. Co.*, 9 Cush. 24; *Chicago etc. R. Co. v. Fahey*, 52 Ill. 81; *Glaseo v. New York etc. R. Co.*, 36 Barb. 557.

⁵ *Kessler v. New York etc. R. Co.*, 61 N. Y. 538; s. c. 7 Lans. 62; *McCormick v. Hudson River R. Co.*, 4 E. D. Smith, 181; *Chicago etc. R. Co. v. Fahey*, 52 Ill. 81; *Fairfax v. New York etc. R. Co.*, 5 Jones & Sp. 516.

 Liability of on whose Line the Loss occurs.

Railway Company received the baggage, and therefore competent evidence to go to the jury for that purpose, with other evidence in the case tending to prove the same fact.¹ In another case, the check of the company, and a delivery of a part of the baggage at the end of their line, were considered sufficient to show a delivery of all the baggage into their possession.²

It is not sufficient to show that the baggage came into the carrier's possession. It must appear that he received it under a contract for carriage, made either directly with the passenger or through the first carrier on the line, in the shape of a through ticket. Thus, a passenger purchased a ticket at Montreal from the agent of the Grand Trunk Railway Company, which on its face purported to carry him to New York by the connecting lines of the Grand Trunk Railway, Plattsburg and Montreal Railroad, Champlain Transportation Company, and the People's Line of Steamboats. At Montreal his baggage was checked by checks which did not purport to be checks of the New York Central and Hudson River Railroad Company, the defendant. He came to New York *via* the People's Line of Steamboats, and *not* by the defendant's line of railway. At Troy, the carrier who had brought him from Whitehall delivered his baggage to the train baggage-master of the defendant, which company brought his baggage to New York. A passenger-agent of the Grand Trunk Railway Company testified that his company was in the habit of checking baggage through to New York under some arrangement with the connecting lines; that the baggage was checked by a check which indicated that it was issued by neither of the lines between New York and Albany, which were the defendant's and the People's Line of Steamboats; that it *might* come by either of these lines, and that the passenger *might* come by one of these lines and his baggage by the other. The court held that this evidence was insufficient to establish an arrangement between the Grand Trunk Railway Company and the defendant that the latter should carry the baggage of a passenger who had not paid his passage on the line of the defendant; that there was no contract between the defendant and the passenger, either directly or through the Grand Trunk Railway Company, for the carriage of his baggage, and that they were not liable *as carriers* for its loss.³

The English rule is, that where the contract is made for through transportation by one of several connecting lines of carriers, a subsequent carrier is not responsible to the passenger for the loss of his baggage, notwithstanding it appeared that it came into his possession, for the reason that there is but one contract, and that with the first carrier who sold the through ticket; there is no privity between the passenger and the subsequent carrier in whose hands the baggage was lost.⁴ But it is settled by very late cases that a subsequent carrier is responsible for a personal injury to a passenger upon its train under such circumstances. It is a case of pure tort. A company having invited or permitted a person to travel on their train, they are bound to make reasonable provision for his safety.⁵

¹ Kansas Pacific R. Co. v. Montelle, 10 Kan. 119.

² McCormick v. Hudson River R. Co., 4 E. D. Smith, 181.

³ Fairfax v. New York etc. R. Co., 5 Jones & Sp. 516.

⁴ Mytton v. Midland R. Co., 4 Hurl. & N. 615; s. c. 28 L. J. (Exch.) 385. See an intima-

tion to the same effect in Kessler v. New York etc. R. Co., 61 N. Y. 538; s. c. 7 Lans. 62. Compare Candee v. Pennsylvania R. Co., ante, p. 419.

⁵ Berringer v. Great Eastern R. Co., 4 C. P. Div. 163; Foulkes v. Metropolitan District R. Co., 4 C. P. Div. 267.

Notes.

Of course, one of a line of carriers into whose hands the baggage of a passenger has come may relieve himself of responsibility by showing that he delivered it to the next carrier over whose line it was intended to go. Evidence of defendant's clerk, that, in the usual course of business on the road, if a trunk was not delivered to the next carrier, it was always brought back to the defendant's office; that he knew of no such occurrence during the month in which the loss occurred; that the baggage-agents on board the defendant's boats made lists of the through baggage delivered by them to the connecting line, and that these lists were not preserved, was held insufficient to show a delivery to the next carrier. Any presumption that could arise from these facts, would be repelled by one equally as strong in favor of the succeeding carrier.¹

§ 4. *Partnership of Carriers.*—In some instances, the running arrangements of carriers have amounted in effect to partnerships, and each has therefore been held liable for the *torts* as well as contracts of the others in the conduct of their common business. Thus, A. and B. were jointly interested in the profits of a common stage-line, but by a private agreement between themselves each undertook the conducting and management of the coach with his own driver and horses for specified distances. In an action against one of them for a negligent injury, the court held that, notwithstanding this private agreement, they were jointly liable for the conduct of their drivers throughout the whole distance, and that an averment that the injury was occasioned by the negligence of A., against whom the action was brought, was supported in such case by proof that the driver was actually employed by B. in conducting the coach for his own stage.² But in order to produce a common liability against each and all the carriers for injuries occurring anywhere along the line of transportation, the arrangement must be really a partnership, with the incident of community of profit or loss. The ordinary running arrangements of connecting lines, where several companies constitute a through line, and fare received for through tickets is accounted for by the first company to the other companies according to a tariff established by each company for itself (there being no division of profits or losses), is not in any sense a partnership involving joint liability.³

Nor will the appointment of a common agent at each end of the route, to receive the fare and give through tickets, constitute them partners as to the passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line.⁴ In case of a loss or injury, the company selling the through ticket may be sued on its contract for through carriage.⁵ Though this is not undisputed, as seen above.⁶ And the company upon whose line the loss or injury occurs may be sued for breach of the contract implied in the reception of the passenger or baggage for carriage.⁷

In New York, in a case against two carriers who formed a connecting line, to enforce a joint liability for an injury to a passenger, and where the defendants admitted that their relations to each other were fixed by written contracts, but

¹ *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402.

² *Waland v. Elkins*, 1 Stark. 272. See also *Bostwick v. Champion*, 11 Wend. 571 (s. c. affirmed in 18 Wend. 175); *Cole v. Goodwin*, 19 Wend. 251. See also *Railroad Co. v. Harris*, 12 Wall. 65.

³ *Croft v. Baltimore etc. R. Co.*, 1 McArthur, 492.

⁴ *Ellsworth v. Tartt*, 26 Ala. 733.

⁵ *Supra*, § 1.

⁶ *Supra*, § 2.

⁷ *Croft v. Baltimore etc. R. Co.*, 1 McArthur, 492.

 Contracts limiting such Liability.

refused to produce the papers, it was held that "every inference warranted by the facts should be indulged against them," and a verdict against them was sustained.¹

§ 5. **Limitation of the Carrier's Liability for Losses and Injuries occurring off his own Line, by Contract and Notice.**—Contracts limiting the carrier's liability and the effect of "carrier's notices" are more fully discussed in other parts of this work,² and do not properly belong to this subject any further than as affected by the peculiar relations growing out of arrangements for through transportation. The liability for losses and injuries on other connecting lines is the consequence of the carrier's contract for through carriage, and there is no reason why he may not stipulate, at the time of selling the ticket, that each carrier must be liable for its own defaults.³ Where the ticket sold by a railroad company to a point on a connecting line contained a printed statement that in the sale of this ticket the company acted as agent only, for roads beyond the terminus of their road, and assumed no responsibility therefor, the court held that the company was not liable for a loss of baggage occurring upon the connecting line.⁴ But in Virginia, the defendant must show that such a notice or stipulation in the ticket had been brought home to the plaintiff's knowledge before the journey began, — that he read it before the cars started.⁵ The burden of proof is upon the defendant to show that the baggage passed out of his custody into that of the next to whom it was to be delivered, before the loss occurred.⁶

¹ *Wylde v. Northern R. Co.*, 53 N. Y. 156.

² *Ante*, Chap. XI.; *post*, Chap. XVI.

³ *Quimby v. Vanderbilt*, *ante*, p. 423.

⁴ *Pennsylvania R. Co. v. Schwarzenberger*, 45 Pa. St. 208.

⁵ *Wilson v. Chesapeake etc. R. Co.*, 21

Gratt. 654. *Contra*, *Burke v. South-Eastern R. Co.*, 5 C. P. Div. 1; s. c. 28 Week. Rep. 306; 20 Alb. L. J. 498. Compare *Henderson v. Stevenson*, L. R. 2 H. L. (Sc. App.) 470.

⁶ *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1; s. c. 44 L. J. (Q. B.) 18; 23 Week. Rep. 25.

CHAPTER XIV.

STREET-RAILROAD COMPANIES.

- LEADING CASES: 1. *Wilton v. Middlesex Railroad Company*. — Scope of employment of driver — Gratuitous passenger.
2. *Burns v. Bellefontaine Railroad Company*. — Contributory negligence of passenger — Riding upon front platform.

- NOTES: § 1. Street-railroad companies are "carriers of passengers."
2. Ejecting person from street car while in motion.
3. Duty of the conductor towards passengers alighting.
4. Duty of passenger to notify conductor or driver of intention to alight.
5. Getting on street car from the side upon which there is another track.
6. Passenger standing on platform of car.
7. Passenger getting on or off car by way of front platform.
8. Passenger projecting arm from window.
9. When the relation of carrier and passenger ceases.
10. Street car obstructing crossing — Right of pedestrian to cross platform.
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1. SCOPE OF EMPLOYMENT OF DRIVER OF STREET CAR — GRATUITOUS PASSENGER.

WILTON *v.* MIDDLESEX RAILROAD COMPANY.*

Supreme Judicial Court of Massachusetts, 1871.

HON. REUBEN A. CHAPMAN, *Chief Justice*.

" HORACE GRAY, JR.,	} <i>Judges.</i>
" JOHN WELLS,	
" JAMES D. COLT,	
" SETH AMES,	
" MARCUS MORTON,	

Scope of Employment of Driver — Gratuitous Passenger — Riding on Front Platform. — If a person riding with due care on the platform of the horse-car of a street

* Reported, 107 Mass. 103.

 Scope of Driver's Employment — Gratuitous Passengers.

railroad company, not as a passenger for hire, but by invitation of the driver, and without collusion with him to defraud the corporation, is injured through his negligence in driving the car, the corporation is liable.

TORT against a street-railroad corporation for personal injuries alleged to have been received by the plaintiff through the negligence of the driver of one of the defendants' horse-cars.

At the trial in this court the plaintiff offered to prove "that on July 16, 1868, at which time she was nine years of age,¹ she went out about seven o'clock in the evening to walk; that she was in company with four or five other girls on the Charlestown bridge, and near the draw, and one of the defendants' cars came along very slowly; that there were no passengers on the platform, and the driver beckoned the girls to get on, and they accordingly got on the platform while the car was going slowly; that the driver then struck his horses, and they started on a fast trot; that the plaintiff had one foot on the step, and by reason of the sudden start, lost her balance; that she called to the driver to stop, but the car kept on, and she fell so that one of the wheels passed over her arm, and she was obliged to have it amputated; and that she used due care, and the driver was careless." It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority was to be implied by the fact of his employment by the defendants as a driver. Upon the plaintiff's offer of proof, the case was reserved by the CHIEF JUSTICE for the consideration of the full court: if the plaintiff was entitled to recover thereon, the case to stand for trial; otherwise, judgment to be given for the defendants.

E. H. Derby, for the plaintiff; *L. M. Child*, for the defendants.

MORTON, J. — The plaintiff was injured while riding upon one of the defendants' cars. At the trial, she offered to prove that she was in the exercise of due care, and that the driver of the car was careless. For the purposes of this hearing, therefore, we are to assume that she was injured by the negligence of a servant of the defendants in the course of his employment, and that her own want of care did not contribute to the injury. It follows that she can maintain this action; unless we sustain the position taken by the defendants, that she was unlawfully upon the car, and therefore not entitled to recover.

The facts which the plaintiff offered to prove, bearing upon this

¹ [In a subsequent action by the father of this plaintiff for loss of services, she stated that her age at the time of the accident was

twelve years and seven months. See *Wilton v. Middlesex R. Co.*, 125 Mass. 130, 131.—ED.]

Wilton v. Middlesex Railroad Company.

question, are as follows: The plaintiff, a girl of nine years of age, was walking with several other girls upon the Charlestown bridge, about seven o'clock in the evening, in July. One of the defendants' cars came along very slowly, and the driver beckoned to the girls to get on. They thereupon got upon the front platform. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority is to be implied by the fact of his employment as driver.

Upon these facts, it is clear that it would be competent for the jury to find that the beckoning by the driver was intended and understood as an invitation to the plaintiff to get upon the car and ride. In accepting this invitation and getting upon the car, we think she was not a trespasser, there being no evidence of collusion between her and the driver to defraud the corporation.

A master is bound by the acts of his servant in the course of his employment. They are deemed to be the acts of the master.¹ The driver of a horse-car is an agent of the corporation, having charge, in part, of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such an act is not one outside of his duties, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently, she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions.

It follows that the plaintiff, being lawfully upon the car, though she was a passenger without hire, is entitled to recover if she proves that she was using due care at the time of the injury, and that she was injured by the negligence of the driver.²

In the present aspect of the case, we are not called upon to consider to what extent the defendants might be held liable if it were shown that the plaintiff was unlawfully riding upon the car.³

Case to stand for trial.

¹ Ramsden v. Boston etc. R. Co., 104 Mass. 117, and cases cited.

² Phila. etc. R. Co. v. Derby, 14 How. 468, 483; s. c. ante, p. 31.

³ [In a subsequent action by the father of the plaintiff for loss of services occasioned

by this accident, the principles of the foregoing case were affirmed, and judgment in the previous suit held to be no bar to the action. Wilton v. Middlesex R. Co., 125 Mass. 130.—ED.]

Supreme Court of Missouri.

2. CONTRIBUTORY NEGLIGENCE OF PASSENGER—RIDING UPON FRONT PLATFORM.

BURNS *v.* BELLEFONTAINE RAILWAY COMPANY.**Supreme Court of Missouri, 1872.*

HON. DAVID WAGNER,	} <i>Judges.</i>
“ PHILEMON BLISS,	
“ WASH. ADAMS,	

Passenger riding upon Front Platform.—The fact that a street-railway passenger voluntarily puts himself on the front platform of the car, when there is room inside, does not constitute negligence, as a matter of law, on the part of such passenger.

APPEAL from St. Louis Circuit Court.

Krum & Patrick, for appellant; *Bakewell & Farish*, for respondent.

ADAMS, J., delivered the opinion of the court. — The plaintiff recovered a judgment for damages growing out of injuries to plaintiff in getting off the front part of one of its cars. There seems to have been some defect in the brakes, so that in going down a steep grade the cars could not be stopped by the use of the brakes, and the plaintiff was seriously injured in trying to save himself by getting off the car. He was on the car as a free passenger, and when he entered the car he passed through it and stood with the driver, without any objection from him, on the front platform. When the horses commenced running, the driver jumped off to stop them, and the plaintiff took the reins and endeavored to stop the car by using the brake, but to no purpose.

Instructions were asked and given in behalf of both parties, on the question of negligence and defect in the car, and contributive negligence of plaintiff. These instructions, to my mind, presented the case fairly to the jury.

The only material question is whether, as a matter of law, the fact that the plaintiff voluntarily put himself on the front platform, when there was room inside the car, absolved the defendant from liability. This question is presented by the refused instructions asked by the defendant. The question of negligence is for a jury to decide, from the facts and circumstances detailed in evidence. Whether the front platform was a more dangerous place than inside the car, is not a question of law, but of fact for a jury. If it be conceded that the front platform was more dangerous, yet the plaintiff was there without any

* Reported, 50 Mo. 139.

Notes.

objection by the defendant or its agent. The defendant had the right to carry passengers on the platform, and passengers might stand there by the consent of defendant's agent. In this case there was no objection at all by defendant's agent to the plaintiff standing on the platform.

In the case of *McKeon v. Citizens' Railway Company*,¹ a special act of the Legislature, entitled "An act concerning street railroads in the city of St. Louis," approved January 16, 1860, was set up as a defence in the answer, and relied on as exempting the railroad company from liability. This act provided that "said railroad companies shall not be liable for injuries occasioned by the getting off or on the cars at the front or forward end of the car." Under this act, if the party complaining received the injury by getting on or off at the front end, then, as a matter of law, under this act he was prevented from recovering. This railway company is not one of the street railroads referred to in that act, and is not protected by its provisions. The defendant does not plead exemption by virtue of this act, or any other act of the Legislature, but looks to the common law as affording the same protection; and asks the court to declare, as a matter of law, that contributive negligence on the part of the plaintiff is to be presumed from his getting off at the front end of the car. This is not the law as applicable to this case.

Let the judgment be affirmed.

NOTES.

§ 1. **Street-Railroad Companies are "Carriers of Passengers."**—Street-railroad companies are "carriers of passengers," within the meaning of a statute which provides that "a carrier of passengers is bound to extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers," etc.² Whether or not, under the statute, they should provide a conductor or other servant in addition to the driver on each of their cars, to protect their passengers, is a question of fact for the jury.³ By a statute in New York, owners of carriages running upon the highway for the conveyance of passengers are liable for all injuries done by a driver while driving such carriage, whether the act was wilful or negligent.⁴ And by the same act a "carriage," as there used, is declared to include stage-coaches, wagons, carts, sleighs, sleds, and every other carriage or vehicle used for the transportation of persons and goods,

¹ 42 Mo. 79.

² Code Ga. 1873, § 2067.

³ *Holly v. Atlanta Street R. Co.*, 7 Reporter, 460. See *Chicago City R. Co. v. Munford*, 21 Alb. L. J. 214; *Citizens' Street R. Co. v.*

Carey, 56 Ind. 396; *Hestonville etc. R. Co. v. Connell*, 6 W. N. C. 514; s. c. 8 Cent. L. J. 306, and observation in 5 South. L. Rev. 704. ⁴ Rev. Stat. N. Y. (2d ed.) p. 696, § 6.

Ejecting Passengers — Passengers alighting.

or either.¹ And while it is very doubtful whether a street car is within the meaning of the act, certainly a conductor of such a car is not the *driver* of a carriage as contemplated by the statute.²

§ 2. **Ejecting Person from Street Car while in Motion.**—In removing a person from a street car for non-payment of fare, or because he is so intoxicated as to be offensive to passengers, it is a question of fact for the jury, and not of law for the court, whether it is due care, and a proper exercise of the right, to do so while the car is in motion.³ The speed of a horse-car may be so far slackened that a person might at a suitable place be ejected with safety; and it cannot be said as a matter of law that it would be wrongful to eject a person, who might otherwise lawfully be ejected, merely because the car was in motion.⁴

§ 3. **Duty of the Conductor towards Passengers alighting.**—“Passenger-carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go,—that is, to the utmost care and diligence of very cautious persons;”⁵ hence, a conductor of a street car does not come up to the requirements of his position who permits his car to stop in front of a rapidly advancing hook-and-ladder truck, and puts off a passenger just in time to come in contact with the vehicle.⁶ It is also the duty of a person in charge of a street car to stop a reasonable length of time to enable a passenger to safely alight.⁷ Therefore, where it was shown that the plaintiff, a lady, with her child about two years of age, were passengers on the defendants’ car; that in alighting she placed one foot upon the ground, when the conductor started the car; that her hoop-skirt caught on the head of a projecting nail upon the platform, and she was thrown down and injured, it was held that the facts as they thus appeared made out a case of negligence upon the part of the company, and it was not error in the trial court to refuse to dismiss the complaint.⁸

§ 4. **Duty of Passenger to notify Conductor or Driver of Intention to Alight.**—If a passenger on a street car attempts to alight without notifying either the conductor or driver, and if they neither know nor have the means of knowing that the passenger intends to get off, or is in the act of getting off, no liability attaches to the fact that the passenger was injured in getting off, by reason of the car not stopping, or suddenly starting rapidly at the time the pas-

¹ *Id.*, § 7.

² *Isaacs v. Third Avenue R. Co.*, 47 N. Y. 122.

³ *Lovett v. Salem etc. R. Co.*, 9 Allen, 557; *Murphy v. Union R. Co.*, 118 Mass. 228; *Healey v. City etc. R. Co.*, 25 Ohio St. 23; *Sanford v. Eighth Avenue R. Co.*, 23 N. Y. 343; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23. The conductor of a street car may exclude or expel therefrom a person who, by reason of intoxication or otherwise, is in such a condition as to render it reasonably certain that by act or speech he

will become annoying or offensive to other passengers therein, although he has not committed any act of annoyance or offence. *Vinton v. Middlesex R. Co.*, 11 Allen, 304, *ante*, p. 6.

⁴ *Murphy v. Union R. Co.*, 118 Mass. 228.

⁵ *Maverick v. Eighth Avenue R. Co.*, 36 N. Y. 378, 381.

⁶ *Ibid.*

⁷ *Crissey v. Hestonville etc. R. Co.*, 75 Pa. St. 83.

⁸ *Poulin v. Broadway etc. R. Co.*, 61 N. Y. 621; *s. c.* (affirming) 2 Jones & Sp. 297.

Notes.

senger was making his exit.¹ However, a notice to the driver by the passenger of his desire to alight is sufficient; and the fact that the passenger did not notify the conductor will not in itself charge him with contributory negligence, where the passenger was injured in getting off a car by reason of its not stopping.² But a negligent or wilful refusal of a conductor or driver to stop the car, after being requested, will not of itself justify a passenger in getting off the front platform of a car while it is in motion.³

There is no rule of law which requires that a passenger on a street car, after he has notified those in charge of it of his desire to alight, and there are indications that the car is about to stop, should remain in his seat until the car has fully stopped. If, after notifying the conductor or driver, he sees that his notice has been understood, he may prepare to leave; and unless he is negligent in alighting, he may recover for the injuries he receives by reason of being thrown off the car by its suddenly starting forward without notice to him.⁴

§ 5. **Getting on Street Car from the Side upon which there is another Track.**—It has been held to be negligence, as a matter of law, for a person to attempt to get upon a street car from the space between two tracks, on seeing another car approaching, some two hundred feet distant, upon the parallel track, by which such person was knocked down and injured.⁵ In another very similar case, it was left to the jury to determine whether, under the circumstances, there was such negligence on the part of the plaintiff as to preclude his recovery.⁶

§ 6. **Passenger standing on Platform of Car.**—It is the duty of a street-railroad company to carry passengers with safety; and if injury to a passenger results from the carelessness of its servants in the management of its car, or from a defective brake, or from an overloaded car, or from all combined, the company will be liable.⁷ The fact that a passenger stands upon the front platform of a car, although there may be room inside, does not *per se* constitute contributory negligence, where he is injured by the fault of the company's servants;⁸ certainly not if the car is so crowded that he cannot get inside, and his fare is accepted by the conductor while he is upon the platform.⁹ But it has been held that standing upon the steps of the front platform of a street car (it appearing that the person would have escaped injury if he had been inside the car) when an accident takes place, in the absence of explanation, is sufficient to make out a *prima facie* case of negligence against the person injured thereby, and the burden is upon him to rebut the presumption. But if while riding in

¹ Nichols v. Middlesex R. Co., 106 Mass. 463; Cram v. Metropolitan R. Co., 112 Mass. 33.

² Mulhado v. Brooklyn City R. Co., 30 N. Y. 370.

³ Cram v. Metropolitan R. Co., 112 Mass. 33.

⁴ Nichols v. Sixth Avenue R. Co., 38 N. Y. 131; Chicago City R. Co. v. Munford, 21 Alb. L. J. 214.

⁵ Halpin v. Third Avenue R. Co., 8 Jones & Sp. 175.

⁶ Dale v. Brooklyn City etc. R. Co., 1 Hun, 146. See also Milk v. Middlesex R. Co., 99 Mass. 167.

⁷ Chicago City R. Co. v. Young, 62 Ill. 328.

⁸ Burns v. Bellefontaine R. Co., 50 Mo. 139, ante, p. 441; Maguire v. Middlesex R. Co., 115 Mass. 239.

⁹ Augusta etc. R. Co. v. Renz, 55 Ga. 126; Hadencamp v. Second Avenue R. Co., 1 Sweeny, 490; Meesel v. Lynn etc. R. Co., 3 Allen, 234; Huelsenkamp v. Citizens' R. Co., 37 Mo. 537; s. c. 34 Mo. 45.

 Passenger getting on and off by Front Platform.

this position he is called upon for his fare, and it is received by the conductor, it will authorize the jury to find that an implied assurance was given to him that it was a suitable place to ride, and therefore that he is not guilty of contributory negligence.¹ And although it is not negligence *per se* to stand upon the platform of a car, yet, where a passenger stood upon the very edge of the platform without holding on to any thing, and with knowledge of the bad condition of the street and track, caused by the accumulation of snow and ice, and maintained that position after an opportunity had been given him to exchange it for a place of comparative safety, until thrown off by a jerk of the car, occasioned by the bad condition of the street and track, it was held that he was guilty of negligence which contributed to the injury, and it was no excuse that the persons in charge of the car knew that he was in an unsafe position and did not drive him therefrom, when the danger was equally well known to him.² The fact that a passenger on a street car was standing on the rear platform, with his hand on the railing, when his hand was injured by the defendant's dray as it passed the rear of the street car, is not, as a matter of law, such negligence as contributes to the injury.³

§ 7. Passenger getting on or off Car by way of the Front Platform.—

It cannot, as a matter of law, be regarded as negligence for a passenger to alight from the front end of a street car while it is at rest, after he has requested the driver to hold his brake for that purpose and has received assurance that he will do so.⁴ It is usually a question of fact for the jury whether those in charge of a car are negligent in allowing a passenger to stand upon, or get on or off, the front platform, and in not sooner stopping the car.⁵ But to allow very young children to get on, or stand upon, the front platform while the car is in motion, is negligence upon the part of the company's employees, as a matter of law.⁶

It has been held in Maryland that a regulation of a street-railroad company prohibiting passengers from getting on or off at the front end of a street car is a reasonable rule and that knowingly to violate it, without the compulsion of some existing necessity is conclusive evidence of negligence of the passenger; so that, should he sustain an injury in consequence, he will have no right of action against the company, although the driver of the car may also have been concurrently negligent; that the circumstance that a driver or conductor may have given permission thus to use the front platform is immaterial, for the company cannot be bound by the act of their servant in attempting to dispense with a known and positive regulation.⁷

¹ Clark v. Eighth Avenue R. Co., 36 N. Y. 135 (affirming s. c. 32 Barb. 657).

² Ward v. Central etc. R. Co., 42 How. Pr. 289.

³ Seigel v. Eisen, 41 Cal. 109.

⁴ Mulhade v. Brooklyn City R. Co., 30 N. Y. 370.

⁵ Crissey v. Hestonville etc. R. Co., 75 Pa. St. 83; Maher v. Central Park etc. R. Co., 67 N. Y. 52; (affirming s. c. 7 Jones & Sp. 155).

⁶ Pittsburgh etc. R. Co. v. Caldwell, 74 Pa. St. 421; Brennan v. Fair Haven etc. R. Co.,

45 Conn. 284; Phila. etc. R. Co. v. Hassard, 75 Pa. St. 367; East Saginaw City R. Co. v. Bohn, 27 Mich. 503; Wilton v. Middlesex R. Co., 107 Mass. 108; s. c. 125 Mass. 130, ante, p. 438; Day v. Brooklyn etc. R. Co., 12 Hun. 435. See Smith v. Hestonville etc. R. Co. (Sup. Ct. Pa. 1880), 10 Cent. L. J. 272, and note.

⁷ Baltimore City etc. R. Co. v. Wilkinson, 30 Md. 224. But see Wilton v. Middlesex R. Co., ante, p. 438; Dunn v. Grand Trunk R. Co., ante, p. 328.

Notes.

Where an act in relation to street railroads provided that "said railroad companies shall not be liable for injuries occasioned by the getting off or on the cars at the front or forward end of the car,"¹ it was held that the effect of this statute was such that where an injury to a passenger was occasioned by his getting off a car at the front platform, it must be presumed, as a matter of law, that the negligence of the passenger himself contributed to produce the accident and injury; yet if the injury were occasioned to a passenger who had got off the front platform and had fallen in front of the wheel, by the driver's negligence in either intentionally starting the horses or in carelessly allowing them to start forward while the passenger was in that position, it would be an independent act of negligence, for which the company might be liable.²

§ 8. *Passenger projecting Arm from Window.*—While there is a difference of opinion as to whether a passenger upon a steam-railway train is guilty of negligence as a matter of law in riding with his arm projecting from the car window,³ this has never been asserted of a passenger upon a street railway in a similar position. It is evident that there is not the same reason for the rule. "The cars of a horse-railway have not the same right to the use of the track over which they travel, do not run at the same speed, are not attended with the same danger, and are not so difficult to check quickly and suddenly, as those of an ordinary railroad corporation."⁴ Therefore each case must stand upon its own facts; and what is or is not ordinary prudence as to the position which one assumes when sitting at an open window of a street car running upon rails, and drawn by horses under the charge of a driver, is not to be determined by any arbitrary rule.⁵

§ 9. *When the Relation of Carrier and Passenger ceases.*—The general principle that the duty of a passenger-carrier towards its passengers is entirely distinct from its duty towards persons who are not,⁶ or who have ceased to be, passengers,⁷ applies equally to street cars as it does to other conveyances. After a passenger has got off from a street car, and is walking upon the highway, the relation of carrier and passenger has ceased, and towards such person the railway company is under the obligation of using only such care as is to be exercised between two persons lawfully using the highway; therefore, where a person was knocked down and injured in the changing of the horses from one end of the car to the other, at the terminus of the line,—she having got off from the forward end of the car in violation of the company's regulations,—this act, which, had she been considered a passenger at the time of the accident, might have been conclusive evidence of negligence, upon the theory that she was not a passenger was considered as not even proximately contributing to the accident.⁸

¹ Mo. Sess. Acts 1859-60, p. 518, § 9.

² *McKeon v. Citizens' R. Co.*, 42 Mo. 79.

³ *Ante*, p. 257.

⁴ *Lynam v. Union R. Co.*, 114 Mass. 83, 88.

⁵ *Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

⁶ *Brand v. Troy etc. R. Co.*, 8 Barb. 368.

⁷ *Imhoff v. Chicago etc. R. Co.*, 22 Wis. 681.

⁸ *Platt v. Forty-second Street etc. R. Co.*, 2 Hun, 124; s. c. 4 Thomp. & C. 406.

Injuries to Pedestrians.

§ 10. Street Car obstructing Crossing—Right of Pedestrian to cross Platform.—Where a street car is stopped so as to obstruct the passage of a pedestrian desiring to cross the street, it is not a trespass or wrongful act on his part to step upon and pass over the platform of the car in order to avoid the obstruction, and if the driver of the car should seize and throw off a person passing over the platform of a car thus obstructing the crossing, the railroad company would be liable in an action for damages for injuries sustained thereby.¹

¹ *Shea v. Sixth Avenue R. Co.*, 62 N. Y.180.

CHAPTER XV.

CARRIERS OF PASSENGERS BY WATER.

- LEADING CASES:** 1. *Benett v. Peninsular and Oriental Steamboat Company*. — Duty of carriers of passengers beyond the seas to receive and carry.
2. *Chamberlain v. Chandler*. — Jurisdiction of courts of admiralty over torts committed upon passengers — Conduct of the master amounting to a tort.

- NOTES:** § 1. Both owner and master are common carriers, although passengers are carried to a foreign country.
2. Who is a passenger.
3. When master of vessel may refuse to receive passengers.
4. When a passenger may be expelled from a vessel.
5. Duty of the carrier to convey passenger to the port to which he has contracted to carry him.
6. Payment of passage-money — Recovery back.
7. Construction of contracts of carriage — Jurisdiction of admiralty courts.
8. Duty of the carrier as to accommodation and treatment of passengers.
9. Authority of master of vessel over passenger.
10. Right of passengers to salvage.
11. Baggage of passengers by water.
12. Injuries to passengers getting on or off a vessel.
13. Rights of passengers *inter se* to berths on steamboats.
14. Duty of the carrier as affected by quarantine.
15. Limitation of liability — English Merchants' Shipping Act.
16. Parties to action in case of injury to passengers from collision of vessels.
17. U. S. statutes affecting carriers of passengers by water.
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1. DUTY OF CARRIERS OF PASSENGERS BEYOND THE SEAS TO RECEIVE AND CARRY.

BENETT *v.* PENINSULAR AND ORIENTAL STEAMBOAT COMPANY.*

English Court of Common Pleas, 1848.

Obligation to receive and carry. — It is the duty of owners and masters of vessels who hold themselves out as carriers of passengers to receive all proper persons who choose

* Reported, 6 O. B. 775. See also *s. c.* 16 C. B. 23. The case was heard before Wilde, C. J., Coltman, Maule, Cresswell, and Williams, JJ.

Obligation to Receive and Carry.

to apply, and are ready and willing to pay for transportation. This obligation attaches equally to carriers of passengers by water from one place to another in the same country, and carriers of passengers beyond the seas.

CASE against the Peninsular and Oriental Steamboat Company for refusing to carry the plaintiff, as a passenger for hire, from Southampton to Gibraltar.

The declaration stated that on, etc., the defendants were possessed of a certain steam-vessel called the Montrose, then lying at Southampton and about to sail for a place beyond the seas, — to wit, Gibraltar, in Spain, — for the carriage of passengers from Southampton to Gibraltar; that the defendants were then common carriers of passengers for hire, in and by the said steam-vessel, from Southampton to Gibraltar; that the plaintiff was then desirous of becoming a passenger in and on board of the said steam-vessel from Southampton to Gibraltar, and then, at a reasonable and proper time in that behalf, tendered himself to the defendants at Southampton aforesaid, to be carried by them as such passenger in and on board the said steam-vessel from Southampton to Gibraltar, and then requested the defendants to receive him as such passenger in and on board the said steam-vessel, to be carried, and to carry him, from Southampton to Gibraltar; that the plaintiff was then ready and willing to pay to the defendants all reasonable passage-money, hire, and reward for being carried by them as such passenger from Southampton to Gibraltar, of which the defendants then had notice; and that, although the defendants then had sufficient room and accommodation in and on board the said steam-vessel to receive the plaintiff in and on board the same as such passenger, and to carry him as such passenger from Southampton to Gibraltar, yet the defendants disregarded their duty in that behalf, and did not nor would receive the plaintiff as such passenger in and on board the said steam-vessel, or carry the plaintiff therein from Southampton to Gibraltar, but wholly neglected and refused so to do; and then caused the said steam-vessel to sail, and the same did then sail, from Southampton to Gibraltar without the plaintiff, etc.

Third plea, that the defendants were not common carriers of passengers for hire, *modo et formâ*, etc.

The cause was tried before WILDE, C. J., at the Sittings in London after Michaelmas Term, 1847. It appeared that the defendants were the proprietors of certain steam-vessels, one of which was advertised by circulars issued by the defendants to sail every ten days from Southampton for Corunna, Vigo, Oporto, Lisbon, Cadiz, and Gibraltar, — the circulars giving the times of starting, and the terms upon which

Benett v. Peninsular and Oriental Steamboat Company.

passengers were to be conveyed to those places respectively, and goods also, if there was room for them; that the plaintiff went to Southampton on the 27th of February, 1847, for the purpose of taking his passage by one of the defendants' vessels, called the Montrose; but that, in consequence of some communication which had been made to the defendants by the Portuguese consul, their agent refused to allow him to take a passage, although it was admitted that there was plenty of room.

On the part of the defendants, it was submitted that the third issue ought to be found for them, for that the common-law liability of carriers did not extend to carriers of *passengers* or to extra-territorial carriers; and that the company's circulars imported a limited and not a general undertaking to carry passengers.

The LORD CHIEF JUSTICE left it to the jury to say whether or not the evidence satisfied them that the defendants carried on the business of common carriers for hire.

The jury found in the affirmative, and a verdict was accordingly entered for the plaintiff on that issue, with leave to the defendants to move to enter the verdict thereon for them if the court should be of opinion that this was not the fair legal inference from the evidence.

The *Attorney-General* now moved accordingly. — Carriers of passengers are not common carriers for hire within the custom of the realm, so as to be liable to the performance of the duty laid in this declaration. And if they are, the custom does not bind extra-territorial carriers. This is not an action for refusing to perform a contract, express or implied; but it is an action that is founded upon a common-law duty. A carrier of goods is an insurer, with this single qualification: that he is not responsible for the act of God or of the king's enemies. In an action against a common carrier, negligence need not be alleged. But, in all the books, the liability of the carrier is restricted to the carriage of goods. The law upon this subject is correctly and conveniently brought together in *Story on Bailments*. In § 495, the learned author says: "A common carrier has been defined to be one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place." § 496. "Common carriers are generally of two descriptions: 1. Carriers by land; 2. Carriers by water. Of the former description are the proprietors of stage-wagons and stage-coaches which ply between different places, and carry goods for hire. So truckmen, teamsters, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one part of a town or city to another. Of the latter description are the owners and masters

English Court of Common Pleas.

of ships and steamboats engaged in the transportation of goods for persons generally, for hire. So are lightermen, hoymen, barge-owners, ferrymen, canal-boatmen, and others employed in like manner." § 498. "But the proprietors of stage-coaches whose employment is solely to carry passengers (such as hackney-coachmen) are not deemed common carriers. They are not responsible for mere accidents happening to the persons of passengers, but only for want of that due care which is required of bailees for hire ordinarily.¹ But if they are accustomed to carry the baggage of passengers, although they receive no specific compensation therefor, and receive simply their fare for the passage of the travellers, yet they are responsible (even if not as common carriers) at least for due and reasonable care of such baggage; since the passengers are thus induced to travel in the coach, and the custody of the baggage may be properly deemed, as in the case of an innkeeper, an accessory to the principal contract." § 499. "And, in modern times, it seems not quite settled, whether, as to passengers' baggage, without any distinct compensation, the coach proprietors are not liable as common carriers. The language of those cases which are supposed to intimate a liability of this sort may perhaps be explicable upon the ground of the ordinary responsibility for ordinary care. In a late case,² Chief Justice BEST seems to have placed the responsibility of coach proprietors carrying passengers and their baggage, upon the ordinary footing of common carriers as to their baggage. And Mr. Bell³ deduces this as the true modern doctrine on the subject." § 500. "But if the proprietors of a stage-coach for passengers carry goods also for hire, they are, in respect to such goods, to be deemed common carriers. The like reasoning applies to packet-ships and steamboats which ply between different ports, and are accustomed to carry merchandise as well as passengers." § 501. "When it is said that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of merchandise for persons in general; such as vessels employed in the coasting trade, or in a foreign trade, for all persons offering goods for the port of destination. But if the owner of a ship employs it on his own account generally, or if he lets the tonnage, with a small exception, to a single person, and then, for the accommodation of a particular individual, he takes goods on board for freight (not receiving them for persons in general), he will not be deemed a common carrier, but a mere private carrier; for he does not hold himself out as engaged in a public

¹ Citing *Aston v. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Camp. 79; *Dudley v. Smith*, 1 Camp. 167; *White v. Boulton*, Peake, 81; *Robinson v. Dunmore*, 2 Bos. &

Pul. 417. And see *Ross v. Hill*, 2 C. B. 877.

² *Brooke v. Pickwick*, 4 Bing. 218; 12 J. B. Moo. 447. ³ 1 Bell's Comm. 467, 468, 475.

 Benett v. Peninsular and Oriental Steamboat Company.

business or employment." The learned author draws a pointed distinction between the liability of a carrier as to goods and as to passengers and their baggage. If the party holds himself out as a carrier of goods as well as of passengers, he is subject to all the liabilities that attach upon a carrier by the custom, but it is otherwise if he holds himself out as a carrier of passengers only. Here it was proved that the carrying of goods was not the primary object and business of the company, but that they only professed to carry goods if they had room for them. Dr. Story thus comments on the case of *Dale v. Hall*:¹ "In the case of *Dale v. Hall*, it would seem to have been held that a person who undertakes to carry goods by water is liable as a common carrier, notwithstanding the declaration does not allege him to be a common carrier, but is founded upon a special contract. That case was in fact against a common hoyman for the negligent loss of goods; and the court was of opinion that, as he was a common hoyman, evidence to show that he was in fact guilty of no negligence was improperly admitted in his defence. It is difficult to perceive how, upon the actual frame of the declaration, any general responsibility as a common carrier could be inferred. And the case, if it proceeded upon the notion that every carrier by water for hire was to be deemed a common carrier, and responsible as such, is inconsistent with later decisions."² In § 508, speaking of the duties and obligations of carriers, Dr. Story says: "One of the duties of a common carrier is to receive and carry all goods offered for transportation, upon receiving a suitable hire. This is the result of his public employment as a carrier; and, by the custom of the realm, if he will not carry goods for a reasonable compensation upon a tender of it, and a refusal of the goods, he will be liable to an action, unless there is a reasonable ground for the refusal." In *Aston v. Heaven*,³ which was an action against the defendants as proprietors of a stage-coach, for negligent driving, in consequence of which the coach was overturned and the plaintiff injured, EYRE, C. J., said: "This action is founded entirely on negligence. It has been said by the counsel for the plaintiff, that, wherever a case happens, even where there has been no negligence, he would take the opinion of the court whether defendants circumstanced as the present—that is, coach-owners—should be liable in all cases except where the injury happens from the act of God or of the king's enemies. I am of opinion the cases of the loss of goods by carriers and the present are totally unlike. When that case does occur, he will be told that carriers of goods are liable by the custom, to guard against frauds they

¹ 1 Wils. 281.

² § 504. Citing *Hutton v. Osborn*, 1 Selw. N. P. (10th ed.) 330 note b; *Robinson v. Dun-*

more, 2 Bos. & Pul. 417; *Satterlee v. Groat*, 1 Wend. 272, and *Boucher v. Lawson*, Cas. temp. Hardw. 174.

³ 2 Esp. 573.

English Court of Common Pleas.

might be tempted to commit, by taking goods intrusted to them to carry and then pretending they had lost or been robbed of them, and because they can protect themselves; but there is no such rule in the case of the carriage of the persons. This action stands on the ground of negligence alone." In a similar case,—*Christie v. Griggs*,¹—the rule was laid down by Lord MANSFIELD in the same way. "There was," he said, "a difference between a contract to carry goods and a contract to carry passengers. For the goods, the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of a coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered." So, in *Crofts v. Waterhouse*,² PARK, J., said: "A carrier of goods is liable in all events except the act of God or the king's enemies; a carrier of passengers is only liable for negligence." *Sharpe v. Grey*³ is not inconsistent with these cases; it decides, in substance, that a coach-proprietor is bound to use all ordinary care and diligence to provide a safe vehicle. [CRESSWELL, J.—It goes a little further than that; it lays it down that he is bound at all events to provide a sound coach. WILDE, C. J., referred to *Bremner v. Williams*.⁴] The only authority that bears against the defendants is an American case cited by Dr. Story,—*Jencks v. Coleman*.⁵ There was an action against the proprietor of a steamboat running from New York to Providence, in the United States, for refusing to receive the plaintiff on board as a passenger. The plaintiff was the known agent of the Tremont line of stage-coaches. The proprietors of the steamboats President and Benjamin Franklin had, as the plaintiff knew, entered into a contract with another line, called the Citizens' Stage-Coach Company, to carry passengers between Boston and Providence in connection with the boats. The plaintiff had been in the habit of coming on board the steamboats at Providence and Newport for the purpose of soliciting passengers for the Tremont line, which the proprietors of the President and Benjamin Franklin had prohibited. It was held that if the jury should be of opinion that the above contract was reasonable and *bonâ fide*, and not entered into for the purpose of an oppressive monopoly, and that the exclusion of the plaintiff was a reasonable regulation in order to carry this contract into effect, the proprietors of the steamboats would be justified in refusing to take the plaintiff

¹ 2 Camp. 79; s. c. *ante*, p. 181.² 3 Bing. 319; 11 J. B. Moo. 133.³ 9 Bing. 457; 2 Moo. & S. 620.⁴ 1 Car. & P. 414.⁵ 2 Sumn. 221; s. c. *ante*, p. 11.

 Benett v. Peninsular and Oriental Steamboat Company.

on board. In giving judgment in that case, Dr. Story seems to assume, that, but for the excuse, the action would have lain.

The second point is one of great importance. Assuming that the defendants would be subject to the liabilities of common carriers if the whole of the alleged duty was to be performed within the realm, are extra-territorial carriers subject to the same liabilities, and bound by the same custom? Is the liability to enure throughout the voyage, or is it to vary according to the law of the port from which the vessel starts? Suppose a party requires to be conveyed from Corunna to Cadiz only, would the custom attach there? If not, where does the common-law liability end?

A rule *nisi* having been granted, —

Petersdorff (with whom was *Byles*, Serjt.) showed cause. — The points urged on the part of the defendants, on moving for the rule, were, first, that the defendants, as carriers of *passengers* only, are not subject to the liabilities that attach by the custom of the realm to common carriers of *goods*; secondly, that the rules which govern common carriers do not apply to the owners of vessels going beyond the limits of her majesty's dominions. If the argument upon either point be correct, this declaration discloses no cause of action; and, consequently, the motion should have been to arrest the judgment; for the court will not award a new trial where, from the insufficiency of the declaration, a new trial must be unavailing. [WILDE, C. J. — Whether the declaration is good or not, the plaintiff was entitled to have the issues disposed of at *nisi prius*, with a view to costs.] The declaration does not allege that the defendants were common carriers according to the custom of the realm, but merely that they were common carriers of passengers for hire; and it alleges a breach of duty in refusing to receive the plaintiff as a passenger on board their vessel, although there was sufficient room. And the third plea is, that the defendants were not common carriers of passengers for hire, *modo et formâ*. [MAULE, J. — The third issue merely presents a question of fact: whether or not the defendants were common carriers of passengers for hire, from Southampton to Gibraltar. It is enough for you to show that the question of law does not arise upon the third plea.] The LORD CHIEF JUSTICE, at the trial, construed the term "common carriers," in the declaration and the third plea, in the same sense as the parties themselves had given to it.

The court called upon —

Ogle (with whom was the *Attorney-General*) to support the rule. There is no consideration alleged on the face of the declaration: it is

English Court of Common Pleas.

founded upon the assumed common-law liability of the defendants as common carriers. It was necessary to state the particular situation and character of the defendants, in order to show how the duty for the breach of which the action is brought arose;¹ but it was not necessary to allege that the defendants were common carriers according to the custom. In *Chitty on Pleading*, vol. 1, p. 238, it is said that, "in an action against a common carrier, or innkeeper, for the loss of goods, etc., — which is a liability founded on the common law, or custom of the realm, — it is not only unnecessary, but improper, to recite such custom; because it tends to confound the distinction between special customs, which ought to be pleaded, and the general customs of the realm, of which the courts are bound to take notice without pleading." The third plea, therefore, very properly, denies that the defendants were common carriers according to the custom, which is impliedly stated in the declaration; for, without that implication, the declaration would clearly be bad, as showing no consideration for the defendants' duty. [MAULE, J. — The allegation of duty is idle.²] The words "common carriers" have a known technical meaning. [MAULE, J. — The declaration states, not that the defendants were common carriers according to the custom of England, or from one place to another within the realm, but that they were common carriers of passengers for hire from Southampton to Gibraltar, in Spain. The third plea denies that the defendants were common carriers of passengers for hire as alleged in the declaration; issue is taken upon that, and the jury have found that they were such common carriers.]

WILDE, C. J. — It seems to me that there is no ground for setting aside the verdict found for the plaintiff on the third issue, and entering a verdict on that issue for the defendants. The declaration alleges that the defendants were common carriers of passengers for hire in and by a certain steam-vessel from Southampton to Gibraltar, in Spain, importing, therefore, a course of trading between a port within the realm and a port out of the realm. The declaration then goes on to allege that the plaintiff was desirous of becoming a passenger on board the said vessel from Southampton to Gibraltar, and tendered himself to the defendants to be so carried, and requested them to receive him as a passenger, and that he was ready and willing to pay all reasonable passage-money and reward for being so carried; but that the defendants, although there was sufficient room and accommodation for the purpose.

¹ Chitty's Pl. (7th ed., by Greening) 399.² Brown v. Mallett, 5 C. B. 592.

Benett v. Peninsular and Oriental Steamboat Company.

in disregard of their duty in that behalf, refused to receive or carry him. To this the defendants pleaded, amongst other pleas, that they were not common carriers of passengers for hire, in manner and form as in the declaration alleged. The evidence offered on the part of the plaintiff to sustain the issue was, that the defendants had issued bills and circulars holding themselves out as ready to carry goods and passengers for hire from Southampton to Gibraltar and certain intermediate places; that their practice had been in correspondence with their circular; and that they refused to receive the plaintiff on board, although there was plenty of room. I left it to the jury to say what was the correct inference to be drawn from that evidence, — whether they were satisfied that the defendants carried on the business of common carriers of passengers for hire from Southampton to Gibraltar. The jury found that the defendants did carry on the business of common carriers of passengers in the manner alleged in the declaration. The question is, whether I was right in so leaving it to the jury. It is to be observed that the declaration alleges the defendants to be common carriers from a place that is within, to a place that is without, the realm. The question is, can a man be a “common carrier” of passengers from a place that is within the realm to a place out of it? Mr. Justice Story, in the very able treatise that has been referred to, defines a common carrier to be a person who does just what the defendants in this case are proved to have done. He says (§ 495): “A common carrier has been defined to be one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place.” It is said that the evidence here did not support the third issue, because the term “common carrier” imports one who carries from and to places within the realm only. But, if we so construe it, we make the declaration bad and inconsistent; whereas, if we read it as meaning “common carriers” according to the definition given by Dr. Story, viz., as persons holding themselves out as undertaking, for hire or reward, to transport the goods of such as choose to employ them, from place to place, we shall be giving the allegation a sense that will make it consistent with the breach. I see no reason for holding that “common carriers” must of necessity mean persons employed to carry within the realm, and according to the custom. It seems to me that this declaration, and the issue taken upon it by the third plea, may be understood in a sense that will make the whole consistent, that the question was properly left to the jury, and that the verdict is right.

COLTMAN, J. — Mr. Ogle’s argument is founded entirely upon the

English Court of Common Pleas.

ordinary form of declaration in actions against inland carriers. The declaration usually states that the defendant was a common carrier of goods and chattels for hire, from a certain place to a certain other place,—though, perhaps, it is not in all cases necessary to give the precise *termini*,—and it goes on to state the delivery of the goods to the defendant, to be safely and securely carried and conveyed by him to their destination. The places from and to which the goods are to be carried must *primâ facie* be understood to be in England; and, as the defendant is alleged to be a common carrier for hire from one place in England to another place also in England, his liability arises from the custom of England, which need not be alleged. This declaration, however, when it calls the defendants “common carriers,” does not mean to allege that they are carriers within the realm, and according to the custom of the realm, but that they are persons who were in the habit of conveying passengers for hire from England to certain places beyond the seas. Whether any particular duty results from that, is altogether another matter. I think the question was correctly left to the jury by the LORD CHIEF JUSTICE, and that the issue was properly found for the plaintiff.

MAULE, J. — I also think there is no ground for disturbing the verdict on the third issue. The question of fact raised by that issue was, whether or not the defendants were common carriers of passengers for hire from Southampton to Gibraltar, in Spain. I think that issue was properly found for the plaintiff. It is true that ambiguous expressions in a declaration, that are pleaded over to, are to be understood in such a sense as will sustain the declaration. So, if it be necessary to sustain a declaration that a place that is mentioned be in England, the declaration being pleaded over to, it will be assumed to be so. Thus, in *Kearney v. King*,¹ where the declaration stated that a bill was drawn and accepted at Dublin, without alleging it to be at Dublin in Ireland, the court would not exclude the possibility of its having been drawn and accepted at a place called Dublin in England. So, if a declaration were to allege that the defendant was a common carrier of goods or passengers for hire from London to Vienna, it would be assumed that both these places were in England. Here, however, the declaration states that the defendants were possessed of a certain steam-vessel called the *Montrose*, lying at Southampton, and bound to, and about to sail for, a place beyond the seas, to wit, Gibraltar, in Spain, for the

Benett v. Peninsular and Oriental Steamboat Company.

carriage of passengers from Southampton aforesaid to Gibraltar aforesaid; and that the defendants were common carriers of passengers for hire, in and by the said steam-vessel, from Southampton aforesaid to Gibraltar aforesaid. The view suggested by Mr. *Ogle* is, that the allegation that the defendants are common carriers of passengers for hire between Southampton and Gibraltar, in Spain, means that they are carriers who somehow or other are subject to the same liabilities and duties as carriers within the realm are subject to. To that proposition I cannot assent. As soon as you establish the *termini*, the only question raised by the third plea is, whether the defendants actually did those things which Dr. Story defines as the duties of a common carrier. It was suggested by the *Attorney-General*, on moving for the rule, that the liabilities of common carriers of goods differ from those incurred by common carriers of passengers. But, whatever the law may be, I think the allegation here can only mean that the defendants were common carriers of passengers in the sense in which Dr. Story speaks of common carriers of goods. Common carriers would not cease to be common carriers although their common-law liabilities should be abrogated by act of Parliament. I think the question was properly left to the jury, and properly found by them.

V. WILLIAMS, J. — I am entirely of the same opinion. The issue arises on a traverse which threw upon the plaintiff the necessity of proving that the defendants were common carriers of passengers for hire from Southampton to a certain place beyond the seas, to-wit, Gibraltar, in Spain. I think the plaintiff is entitled to retain the verdict found for him upon that issue. If the defendants are not liable to an action of this sort, they might have moved in arrest of judgment, or have brought a writ of error.

Byles, Serjt., observed that it was agreed at the trial that the decision of the court should place the parties in the same position as if the LORD CHIEF JUSTICE had directed the jury in conformity therewith, and a bill of exceptions had been thereupon tendered and sealed.

WILDE, C. J. — That certainly was so; though I very much doubt both the propriety and the convenience of the arrangement.

MAULE, J. — Then, this is, in effect, a sort of extra-judicial writ of error, — from the judge who presided at the trial, to the court, — before proceeding to the Exchequer Chamber.

*Rule discharged.*¹

¹ No point arose in respect of Gibraltar being a possession of the British crown. It was stated in the declaration to be in Spain.

Circuit Court of the United States, First Circuit.

2. JURISDICTION OF COURTS OF ADMIRALTY OVER TORTS COMMITTED UPON PASSENGERS—WHAT CONDUCT OF THE MASTER AMOUNTS TO A TORT.

CHAMBERLAIN *v.* CHANDLER.*

Circuit Court of the United States for the First Circuit, 1823.

HON. JOSEPH STORY, *Associate Justice of the Supreme Court.*

“ JOHN DAVIS, *District Judge.*

1. **Jurisdiction of Courts of Admiralty.**—Courts of admiralty have jurisdiction of personal torts and wrongs committed on a passenger on the high seas by the master of the ship.
2. **Authority of Master of Vessel.**—The authority of a master at sea is necessarily summary, and often absolute. For the time being, he exercises the rights of sovereign control; and obedience to his will, and even to his caprices, becomes almost indispensable.
3. **What Conduct of the Master will amount to a Tort.**—It is not a correct proposition of law, that, if the person of a passenger is untouched, if acts of oppression and insult on the part of the master towards a passenger do not amount to an assault and battery, they are not to be redressed. Passengers can claim something more, under the contract for passage, than mere shiproom and transportation, viz., respectful treatment, protection from general obscenity, immodesty of approach, wanton disregard of feelings, threats of personal injury, restraint within unreasonable limits, and may demand suitable food and the common means of relief in cases of sea-sickness and ill-health.

THIS was a libel in admiralty, brought by the libellants (being husband, wife, and children), who were passengers on board of the ship *Pearl*, on a voyage from the island of *Woakoo* to *Boston*, against the defendant, who was master of the ship for the voyage, for damage for asserted ill-treatment and injuries to them during the voyage. The defendant put in, by way of answer, an allegation denying the ill-treatment and injuries. The cause came on to be heard upon the evidence, and was argued by—

Hubbard and *Webster*, for the libellants, and by *T. Fuller*, for the defendant.

STORY, J. — No exception has been interposed against the jurisdiction of the court in this case. I wish, however, that it should be understood that the point has not passed *sub silentio*, but that it has attracted the consideration of the court. The contract itself is a maritime contract, for the conveyance of passengers on the *high seas*, and the wrongs complained of are gross ill-treatment and misconduct in the course of the voyage, while on the *high seas*, by the master, in breach of the stip-

* Reported, 3 *Mason*, 242.

Chamberlain v. Chandler.

ulations necessarily implied in his contract, of the duties of his office, and of the rights of the libellants under the maritime law. The jurisdiction of courts of admiralty over torts committed *in personam* on the high seas has never, to my knowledge, been doubted or denied by the courts of common law, and has been often recognized by adjudications in the admiralty.¹ In 4 *Institutes*, 134, the common-law judges admitted, in the fullest manner, that, "of contracts, pleas, and *querelles* made upon the seas, etc., the admiral hath, and ought to have, jurisdiction; and no precedent can be shown that any prohibition hath been granted for any contract, *plea*, or *querelle* concerning any marine cause, made or done upon the sea." As to the competency of the admiralty to award damages for personal wrongs in cases of captures, as prize, *Le Caux v. Eden*² is directly in point; and further, that in such cases (*i.e.*, of prize) it is exclusive.³ No distinction has been recognized between torts to property and torts to persons on the high seas, and in *Le Caux v. Eden* the court seemed to think that none existed. In the case of *Lindo v. Rodney*,⁴ the court held that the operation of the statutes of Richard was only "to confine the admiralty by the locality of the thing done, which is the cause of action; *it must be done on the high seas.*" Indeed, a tort on the high seas is strictly within the words of those statutes, a *plea* or *querelle* arising on the high seas. And it cannot make any difference, in point of principle, whether it be a direct or consequential wrong, whether it be an assault and imprisonment, or a denial of all comforts and necessities, and a course of brutal insult and maltreatment, whereby the health of the party is materially injured, or he is subjected to gross ignominy and mental suffering.

The admiralty has been accustomed to deal with subjects of this nature from early times. In the case of *The Ruckers*,⁵ a civil suit for damages was brought in the admiralty for an assault by the master of a ship on a passenger on the high seas, and on full consideration the jurisdiction was sustained. On that occasion the court directed the records to be searched, and the registrar reported "that many instances were to be found of proceedings on damages on behalf of persons described as part of the ship's company, against officers or others belonging to the same ship, and several against persons belonging to other ships; and there were other instances of proceedings on the part of A. B. against C. D., without any specification of the capacity in

¹ 2 Brown's Adm. 103; 3 Bla. Comm. 106.

² 1 Doug. 572.

³ Sir Leoline Jenkins's Works, p. 774, Vol. II. See also *Caton v. Burton*, Cowp. 330; 2

Brown's Adm. 108, 110; 3 Bla. Comm. 106; Zouch's Adm. Jurisdic. 104.

⁴ 1 Doug. 591, note.

⁵ 4 Rob. 73.

Circuit Court of the United States, First Circuit.

which the persons stood." Sir WILLIAM SCOTT said: "Looking to the locality of the injury, that it was done on the high seas, it seems to be fit matter for redress in this court." Dr. GODOLPHIN (a very learned admiralty judge), in enumerating the various subjects of admiralty jurisdiction, includes "all affairs relating to mariners, whether ship officers or common mariners, their rights and privileges respectively; their office and duty; their wages; their offences, whether by wilfulness, casualty, ignorance, negligence, or insufficiency, with their punishments."¹

My judgment accordingly is, that the libel is well founded in point of jurisdiction; and that, if the injuries complained of are established in evidence, the plaintiffs are entitled to redress, constituting, in the technical phrase of the admiralty, "a cause of damage."

In respect to a case like that before the court, a suit by passengers (a husband, wife, and family) against the master of the ship for continued wanton cruelty and ill-treatment, it is certainly entitled to be listened to with attention. The authority of a master at sea is necessarily summary, and often absolute. For the time, he exercises the rights of a sovereign control; and obedience to his will, and even to his caprices, becomes almost indispensable. If he chooses to perform his duties or to exert his office in a harsh, intemperate, or oppressive manner, he can seldom be resisted by physical or moral force; and therefore, in a limited sense, he may be said to hold the lives and personal welfare of all on board, in a great measure, under his arbitrary discretion. He is nevertheless responsible to the law; and if he is guilty of gross abuse and oppression, I hope it will never be found that courts of justice are slow in visiting him, in the shape of damages, with an appropriate punishment.

In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere shiproom and personal existence on board, but for reasonable food, comforts, necessities, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment; for that decency of demeanor which constitutes the charm of social life; for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet farther, — it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors by the excitement of terror and cool malignancy of conduct

¹ See also Exton's Adm. Jurisdic. 70.

Notes.

to inflict torture upon susceptible minds. What can be more disreputable, and at the same time more distressing, than habitual obscenity, harsh threats, and immodest conduct to delicate and inoffensive females? What can be more oppressive than to confine them to their cabins by threats of personal insult or injury? What more aggravating than a malicious tyranny, which denies them every reasonable request, and seeks revenge by withholding suitable food and the common means of relief in cases of sea-sickness and ill-health? It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. The law looks on them as unworthy of its cognizance. The master is at liberty to inflict the most severe mental sufferings, in the most tyrannical manner, and yet, if he withholds a blow, the victim may be crushed by his unkindness. He commits nothing within the reach of civil jurisprudence. My opinion is that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operated by way of direct or of consequential injuries. In each case, the contract of the passengers for the voyage is in substance violated; and the wrong is to be redressed as a cause of damage. I do not say that every slight aberration from propriety or duty, or that every act of unkindness or passionate folly, is to be visited with punishment; but if the whole course of conduct be oppressive and malicious, if habitual immodesty is accompanied by habitual cruelty, it would be a reproach to the law if it could not award some recompense.

Let us now proceed to the consideration of the evidence in this case, so far as it applies to the libel, which is not confined to mere acts of wanton cruelty and misconduct, but embraces in its grievances what the law in its strictest sense deems assaults and batteries.

[The judge went into a full examination of the evidence, and came to the conclusion that the libel was sufficiently proved to entitle the libellants to damages; and he accordingly decreed that the defendant should pay \$400 damages (being the amount of his share of the passage-money received for the passage of the libellants) and costs of suit.]

Decree accordingly.

NOTES.

§ 1. Both Owner and Master are Common Carriers, although Passengers are carried to a Foreign Country.—Both the owner and master of a vessel, undertaking for hire or reward to transport passengers from place to

Who is a Passenger.

place, and who are bound to carry all proper persons who offer themselves for carriage, are common carriers of passengers, and subject to the duties imposed by law upon such carriers.¹ The fact that the vessel carries passengers from a place within the realm to a point beyond, will not exempt them from the obligation to receive and carry all proper persons who offer themselves and are ready and willing to pay the price of passage.²

§ 2. Who is a Passenger. — A person may be on board of a ship in such a capacity as to be considered neither master nor one of the crew, nor sustain the legal relation of passenger. Thus, it was held by Dr. LUSHINGTON,³ judge of the High Court of Admiralty, that a person who had paid no passage-money, but who went on board by permission of the master, and messed with him, upon the understanding that he should do what he could in the working of the ship for his passage, was neither one of the crew nor a passenger; that he was, in fact, a nondescript. So, where the master of a vessel had taken on board, without the knowledge of the owners, his wife and her father, who paid no fare, it was held that they were not passengers.⁴

Soldiers on board ship, under the command of their officers, do not occupy the relation of passengers, and they can recover compensation for services in assisting in keeping the vessel afloat by bailing, working under the command of their own officers and keeping up military discipline during the time they were so employed.⁵ The *status* of a soldier on shipboard, for whose transportation the government had contracted, is not changed by the expiration of his term of service and honorable discharge therefrom during the voyage. While the contract of transportation is being performed, it is not competent for the government by the act of discharge, or by the soldier receiving it, to change its terms so as to give such person new rights or impose new obligations upon the master.⁶

The question as to what relation a person held towards a navigation company, whether that of employee or passenger, was presented in a California case,⁷ the facts of which were as follows: At the time the cause of action accrued, the defendants were common carriers of freight and passengers between San Francisco and Petaluma, using steamboats between San Francisco and Rudesel's Landing, and between the latter place and Petaluma a small locomotive and train of cars. There was no separate charge for passage; it was all one line and was under one management, the captain of the steamboat acting as conductor of the cars. At the time of the accident, the plaintiff was keeping a bar upon the steamboat, paying the company for this privilege and the use of a stateroom and such meals as he might desire upon the boat, and receiving to his own use the profits of all sales of liquors. The plaintiff resided at Peta-

¹ Chamberlain v. Chandler, 3 Mason, 242; ante, p. 459; White v. McDonough, 3 Sawyer, 311; Anderson v. Ross, 2 Sawyer, 91.

² Bennett v. Peninsular etc. Steamboat Co., ante, p. 448.

³ The Hanna, 36 L. J. (Adm.) 1; s. c. 15 Week Rep. 263; L. R. 1 Adm. 283; 15 L. T. (N. S.) 334.

⁴ The Lion, L. R. 2 Adm. 102; s. c. 38 L. J. (Adm.) 51.

⁵ The Steamer Merrimac, 1 Ben. 201; s. c. 1 Ben. 68.

⁶ White v. McDonough, 3 Sawyer, 311.

⁷ Yeomans v. Contra Costa etc. Nav. Co., 44 Cal. 71.

Notes.

luma, and when about to enter the cars at that place, intending to make the usual daily trip to San Francisco, the boiler of the locomotive, then in charge of the defendants' engineer, exploded and caused the personal injury for which the action was brought. The question was, whether his position as barkeeper did not place him in the relation of an employee to the Navigation Company. On appeal, the court said: "As barkeeper, he was in no sense an employee of the defendants. He was a lessee, for a monthly rent, of an apartment upon their boat, which he occupied for purposes of trade. His transportation over the route was a part of the consideration for the monthly payment. The defendants had no interest in the receipts of his business, and could not hold him accountable for its proper conduct. The parties were in no sense members of the same establishment for one common purpose. The vending of liquors and cigars to passengers was no part of the business in which the transportation company were engaged. The case would have been the same if the plaintiff had leased an apartment upon the boat for any other species of trade. If a cigar-vender should rent and occupy, for the purposes of his trade, a corner of a merchant's store, and an explosion should occur through the negligence of the merchant's clerk, it would not be contended that the merchant would not be responsible in damages to the cigar-vender for personal injuries resulting from the accident. The fact that the place of trade was upon a steamboat can make no difference in the application of the principle." Judgment for the plaintiff was therefore affirmed.

One who enters upon a passenger-steamboat in good faith, to take passage thereon, is there in the relation and character of a passenger, and the owner of the boat owes to him the duty of a carrier of passengers, although no fare has been paid.¹

§ 3. When the Master of a Vessel may refuse to receive Passengers. — Generally speaking, common carriers of passengers by water, as by land, are bound to receive and carry all proper persons who offer themselves for transportation to the places to which the carriers hold themselves out as such.² But there may be sufficient reasons for refusing to receive passengers. If his vessel is full, or so full that those who have gone on board while there was room would be incommoded by the addition of other passengers, the carrier may decline to receive them. Indeed, passengers who have contracted for carriage, and, upon going aboard, find that the vessel is so full as to seriously inconvenience them, may recover back the passage-money already paid, and any damages they may have suffered by reason of preparing themselves for a voyage upon that vessel, or by reason of having to wait for another.³

The right of passage on board of a vessel is subject to such reasonable regula-

¹ *Cleveland v. New Jersey Steamboat Co.*, 63 N. Y. 306; *s. c.* 5 Hun, 523.

² *Benett v. Peninsular etc. Steamboat Co.*, 6 C. B. 775, *ante*, p. 443; *Pearson v. Duane*, 4 Wall. 605, *ante*, p. 17; *Jencks v. Coleman*, 2 Sumn. 221, *ante*, p. 11. If a ship-owner refuses to carry a passenger whom he had engaged to carry, and proceeds on the voy-

age without giving the passenger reasonable opportunity to remove his baggage, or with intent to carry it beyond his reach, he thereby terminates the contract of carriage, and is liable for carrying away the baggage. *Holmes v. Doane*, 3 Gray, 328.

³ *The Pacific*, 1 Blatchf. 569.

Expulsion of Passengers.

tions as the owners may prescribe for the due accommodation of passengers and for the due arrangement of their business. They are not bound to receive as passengers persons who refuse to obey the reasonable regulations of the vessel, who are guilty of gross and vulgar habits, who would make disturbances, whose characters are doubtful, dissolute, or suspicious; and, *à fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative.¹ So, too, a master of a vessel may refuse to receive a passenger to be carried to a place from whence he has been banished, if the circumstances of the banishment would, in the opinion of the master, tend to promote further difficulty should he be returned to that place.²

§ 4. When a Passenger may be expelled from a Vessel. — But, in the case just noticed,³ it was said that after the vessel has put out to sea it is too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board, unless he misbehaves during the voyage. This statement seems to have been based upon an instruction given to a jury by ROLFE, B., in an English case.⁴ In this latter case, the plaintiff (a tradesman) and his friends took passage on an excursion from London and return, paying the passage-money for the trip. On the return, as the vessel approached Gravesend, the captain said to the plaintiff and his friends: "You are well known; you sha'n't go with me to London; you belong to the swell mob, and are pickpockets. You must go ashore at Gravesend; and if you will not go by fair means, you shall be compelled to go." On arriving at Gravesend, they left the vessel. They had considerable difficulty in procuring means of conveyance to London, because they had been turned out of the defendant's vessel. In instructing the jury, ROLFE, B., said: "The defendants were responsible for any injury naturally resulting from the acts of the captain when acting as their servant. Even supposing the plaintiff and his party had been pickpockets, or belonged to the swell mob, that might be a reason for watching them, but, so long as they were not guilty of any impropriety on board, formed no justification for putting them ashore;" and he held that the plaintiff was entitled to a fair compensation for the injury received, so far as the injury arose from the act of the captain in putting him on shore. It would seem that there can be no distinction in principle between refusing to receive a passenger because the carrier has reasonable grounds to believe that he will become obnoxious, and putting him ashore for the same reason. And in a case where a drunken passenger on a horse-railroad was ejected, the court held it to be unnecessary to wait until an overt act was committed, to justify the conductor in expelling him.⁵

§ 5. Duty of the Carrier to convey Passenger to the Port to which he has contracted to carry him. — It is incumbent upon the carrier to transport his passengers to the port to which he has contracted to carry them. And when pas-

¹ Jencks v. Coleman, *ante*, p. 11.

⁴ Coppin v. Braithwaite, 8 Jur. 875.

² Pearson v. Duane, 4 Wall. 605; *s. c. ante*, p. 17.

⁵ Vinton v. Middlesex R. Co., 11 Allen, 304, 307; *ante*, p. 6. See also The People v. Caryl, 3 Park. Cr. Cas. 326.

³ Pearson v. Duane, *supra*.

Notes.

sengers are conveyed, without their consent, to a different port from that agreed upon at the time of sailing, no recovery can be had by the carrier for the amount of their passage-money; ¹ and if they have suffered damage by reason of not being carried to the proper port, they may recover compensation in an action therefor, ² whether they made the contract for passage with the master of the ship or with a ship-agent, if the action of the master in reference to the matter is such as to impliedly ratify the acts of the ship-agent, and they are received on board as passengers to the port to which they contracted to be carried. Thus, it appeared that the libellants, in number more than one hundred, had engaged with a ship-agent at Cork for a passage to New York, and some of them had purchased tickets, in the first instance, to sail direct to that port; but the vessel in which it was proposed to carry them not being ready for sea, the ship-agent chartered, it was said, the "between decks" of the *Wataga*, a vessel then in port, and bound to Philadelphia, and gave to each of the libellants a certificate in the usual form, by which he engaged they should be carried to Philadelphia on board of her, and with a written indorsement that on her arrival at that port they would be forwarded to New York free of expense. These certificates were exhibited to the mate, and afterwards to the master, who took possession of them before the vessel sailed, and retained them until he was compelled to produce them in court. On the arrival of the vessel at Philadelphia, the master refused to forward them to New York, and there was no one at Philadelphia representing the ship-agent, who would do so. It was held that it must be considered that the agreement was made with the master's concurrence, and therefore binding as his act. ³

If the carrier contracts to carry a passenger to a particular point, with a knowledge of the danger of effecting a landing at that point, such danger will not excuse him for a failure to comply with the contract. ⁴ Where the owner of a line of vessels agrees to transport a person from one place to another by a particular line of vessels, and at the time the agreement is made, but unknown to the proprietor, one of the connecting vessels of the line is a total wreck, it is his duty to provide another with all reasonable diligence. ⁵ In such a case, the act of God does not wholly excuse the carrier from the performance of his contract. And the master of a vessel will not be excused from completing the contract of transportation by taking his passengers into another and foreign port and leaving them there, without their consent, because he has learned that another vessel has been compelled to abandon the line on account of hostilities existing at the point of connection. ⁶

§ 6. **Payment of Passage-Money** — When it may be recovered back. — The term "freight," usually applied to compensation for the conveyance of the cargo,

¹ *McGloin v. Henderson*, 6 La. 715. See *Gibson v. Bradford*, 4 El. & Bl. 586; s. c. 1 Jur. (N. S.) 520; 24 L. J. (Q. B.) 159.

² *The Canadian*, 1 Brown's Adm. 11; *Coppin v. Braithwaite*, 8 Jur. 875; *Sunday v. Gordon*, 1 Blatchf. & H. Adm. 569.

³ *Dennison v. The Wataga*, 1 Phila. 468.

⁴ *Porter v. Str. New England*, 17 Mo. 290.

⁵ *Williams v. Vanderbilt*, 28 N. Y. 217 (affirming s. c. 29 Barb. 491, and overruling *Briggs v. Vanderbilt*, 19 Barb. 222, and *Bonsteel v. Vanderbilt*, 21 Barb. 26). See also *Ward v. Vanderbilt*, 4 Abb. App. Dec. 521.

⁶ *West v. Str. Uncle Sam*, 1 McAll. 505.

Construction of Contracts of Carriage.

has been held in its most general sense to include passage-money. The same rules govern the payment of each.¹ When money is paid by one party in contemplation of some act to be done by the other, and the thing stipulated to be done is not done, the money may be recovered back. Hence, when passage-money is paid in advance, under a contract to carry a passenger to a particular port, and the voyage is broken up by a peril of the sea, and the passenger is not carried by reason thereof to his destination, there being no custom, law, or contract to the contrary, he may recover back the passage-money thus paid. The contract is entire, and unless the voyage is fully performed by a delivery of the passenger at the port to which the carrier has contracted to carry him, nothing has been earned.² Of course, in an action against the ship-owner, it cannot be recovered back if the passage-money earned on the voyage is to belong to the captain of the vessel.³

Unless there is an agreement or usage to that effect, no passage-money is due before the passenger has arrived at his port of destination. On the breaking up of the voyage, if the passenger desires to proceed, his expenses, or the means of proceeding to the port to which he was to be carried, must be paid or tendered to him; and if this is done when he has not paid his passage-money in advance, and he refuses to proceed, compensation *pro rata itineris* — that is, such part or proportion of the whole passage-money as the part of the voyage performed is of the whole voyage — is demandable of him.⁴ A usage which requires that the passage-money shall be paid in advance, and which does not require its return although the voyage is defeated, does not extend to a case where the money is paid in anticipation of the sailing of the vessel, and she is lost before the commencement of the voyage. In such a case, the passage-money could be recovered back.⁵ Where there was a rule of the East India trade, that if a passenger refused to go in consequence of delay in the sailing of the vessel, he was to forfeit one-half of the passage-money agreed for, and it appeared that a vessel bound for the East Indies was advertised to sail by a certain time, and she did not do so, it was held that a person who refused to go after having engaged passage was liable for the one-half of the amount agreed to be paid, unless either time was of the essence of the contract, or the delay in sailing was unreasonable.⁶

§ 7. Construction of Contracts of Carriage — Jurisdiction of Admiralty Courts. — Contracts for passenger carriage at sea are within the jurisdiction of the admiralty courts.⁷ In construing such contracts, the general rules of construction apply. In an agreement under seal for the hire of the cabins and accommodations for passengers in a ship, where there was a stipulation that if it should be necessary, for the convenience and at the request of the hirer, to

¹ *Brown v. Harris*, 2 Gray, 359; *The Aberfoyle*, 1 Blatchf. 360; *The Pacific*, 1 Blatchf. 569.

² *Brown v. Harris*, 2 Gray, 359; *Watson v. Duykinck*, 3 Johns. 335. And see *Mulloy v. Backer*, 5 East, 316.

³ *Leman v. Gordon*, 8 Car. & P. 392.

⁴ *Howland v. The Lavinia*, 1 Pet. Adm. 123.

⁵ *Gillan v. Simpkin*, 4 Camp. 240.

⁶ *Yates v. Duff*, 5 Car. & P. 369.

⁷ *Dennison v. The Wataga*, 1 Phila. 468; *The Aberfoyle*, 1 Blatchf. 360; *Sunday v. Gordon*, 1 Blatchf. & H. Adm. 569; *The Moses Taylor*, 4 Wall. 411; *The Pacific*, 1 Blatchf. 569; *The Zenobia*, 1 Abb. Adm. 48; *s. c. id.* 80; *Marshall v. Bazin*, 7 N. Y. Leg. Obs. 342. See, *contra*, *Brackett v. Hercules*, 1 Galp. 184.

Notes.

put into an intermediate port for stock or otherwise, the hirer would pay all port and necessary charges consequent thereon, it was held that this raised an implied covenant on the part of the captain who let the cabins to put into any such port if desired. There was also a covenant on the part of the captain to permit and suffer the hirer to stow away the baggage of the passengers in a part of the hold. This, it was held, fairly imported that there should be some demand or request made by the hirer for the clearing of the space agreed on; and that a covenant to keep up a supply of the necessary and usual quantity of water for the use of passengers, etc., is not broken by a deficiency for a short time, occasioned by the unusual length of the voyage.¹ An officer in the East India Company's service came home on a "sick certificate." By an order of the court of directors, officers of his rank coming home under these circumstances were to pay 1,000 rupees, and no more, "for their passage and accommodation at the captain's table." The defendant paid this amount into court, but the plaintiff asked for £145, on the ground that, for the regulation price, officers were only entitled to swing their cots in the steerage; that the defendant had a cabin to himself; and that the sum demanded was not more than he received from others who enjoyed the same advantage. It appeared that on board the vessel during that voyage no officers did sleep in the steerage; that the cabin occupied by the defendant would have remained empty, or been filled with stores, if he had been excluded from it; and that he had not made any express promise to pay more than 1,000 rupees. Lord ELLENBOROUGH held that there appeared nothing to raise an implied promise on the part of the defendant to pay more than the regulation sum.²

Where A., "in consideration of \$100, to be paid immediately," agreed that he would suffer B. to proceed and go in A.'s vessel as a passenger from New York to St. Thomas, and to load on board, for transportation, goods to the value of \$600, and B. paid the \$100 down, and went on board with his goods, but the vessel, soon after the commencement of the voyage, was shipwrecked and lost, but the goods were saved and delivered to B., and B. brought an action to recover back the \$100, it was held that this was an agreement to receive B. and his goods on board, and not an agreement to transport and deliver them at St. Thomas, and that the plaintiff, therefore, was not entitled to recover back the money thus advanced; that the consideration for the payment of the money was the receiving of B. and his goods on board, and not the transportation or delivery of them.³

§ 8. **Duty of Carrier as to Accommodation and Treatment of Passengers.** — It is the duty of the common carrier by water to provide his passengers with comfortable accommodations both by day and by night, and with a sufficient supply of wholesome food, unless there is a contract to the contrary. An undertaking to carry a passenger in the steerage of a steamship generally includes the furnishing of such passenger with a berth, unless there is a fair understanding to the contrary. Such a passenger is entitled to the use of the steerage-room, in which to walk about or sit down, during the voyage, without exposure to risk or inconvenience from freight therein; but if freight is

¹ *Corbyn v. Leader*, 6 Car. & P. 32 (affirmed in 10 Bing. 275).

² *Adderley v. Cookson*, 2 Camp. 15.

³ *Watson v. Duykinck*, 3 Johns. 335.

Accommodation and Treatment of Passengers.

stowed within the steerage-room, it is the carrier's duty to so stow and secure it as not to cause injury to the passengers; nor can the carrier impose any arbitrary regulation upon the passengers, with a view of diminishing such risk,—such as that passengers shall remain in their berths during the whole voyage, or in any unusual portion of the steerage.¹

Where the plaintiff contracted with the owners of a vessel, and paid for his passage in the cabin, the fact that, when he came on board, the master declared his inability to lodge him in the cabin, and proposed that he should forbear taking his passage, or stay with his baggage on deck, did not absolve the owners from the obligation to accommodate him in the cabin with his baggage.²

In determining what are comfortable accommodations and what is a sufficient supply of food, each case would to a great degree depend upon its own circumstances. There can be no rule which will define every instance of a breach of duty on the part of the carrier in these respects. In a case³ where the captain of a ship was sued for not furnishing good and fresh provisions to a passenger, Lord DENMAN, C. J., said: "I think the result of the whole is, that the captain did not supply so large a quantity of good and fresh provisions as is usual under such circumstances. But there is no real ground of complaint, no right of action, unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had that he is therefore to have a right of action against the captain who does not provide all that he ought."

While it is the duty of the officers of the vessel to supply cabin-passengers with seats at the table during meals, yet the officers may reserve a table in the dinner-cabin for their own use, and may exclude passengers from it; and if a passenger should persist in remaining at it after proper notice that it was thus reserved, and that provision would be made for him elsewhere, they would have the right to use so much force as would be necessary to remove him.⁴ Conduct unbecoming a gentleman, in the strict sense of the word, will, it seems, justify the captain of a ship in excluding a passenger from the cuddy table, whom he has engaged by contract to provide for there; but it is difficult to say in what degree want of polish would, in point of law, warrant such exclusion; but it is clear that if a passenger uses threats of personal violence towards the captain, that officer may exclude him from the table, and require him to take his meals in his own private apartment. But if a passenger be excluded from the cuddy table, and his wife, not from compulsion, but from a wish to be with her husband, takes her meals with him in private, this will not amount to a breach of contract on the part of the captain so far as regards the wife.⁵

In regard to the treatment of passengers by the master of a vessel, Judge STORY says: "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere shiproom and personal existence on board." This and other language of Mr. Justice STORY in the leading case of *Chamberlain v. Chandler*⁶ must be regarded as a most complete exposition of the duties of this officer. It has been frequently

¹ The *Oriflamme*, 3 Sawyer, 397; s. c. 2 Cent. L. J. 473; 7 Ch. Leg. N. 347.

² *St. Amand v. Lizardi*, 4 La. 243.

³ *Young v. Fewson*, 8 Car. & P. 55.

⁴ *Ellis v. Narragansett Steamship Co.*, 111 Mass. 146.

⁵ *Prendergast v. Compton*, 8 Car. & P. 454.

⁶ 3 Mason, 242, 245; *ante*, p. 459.

Notes.

quoted and made the basis of decision in cases of a similar character.¹ Respectful treatment of the passenger is equally due from the other officers and the crew of the vessel as it is from the captain, and the master and owners of the vessel are liable for damages occasioned by the want of it.² And seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers for the sake of preserving their own. On the contrary, being common carriers, and so paid to protect and carry the passengers, if, in case of a wreck, it becomes necessary, in order to save any of those on board, that others should be sacrificed, the seamen, beyond the number necessary to navigate the boat, in no circumstances can claim exemption from the common lot of the passengers.³

§ 9. **Authority of Master of Vessel over Passenger.**—The master of a vessel has absolute control over his passengers in all that is necessary for good order or the safety of the passengers, crew, or vessel.⁴ The passenger is bound to obey all reasonable orders of the captain. If a passenger misconducts himself, he may be deprived of the accommodations which he has before enjoyed, or he may be imprisoned or put in irons. But the power of the captain is limited to the necessities of the case. It would not be sufficient to justify the captain in putting a passenger in irons, that he suspected that a mutiny might be caused by language of the passenger; but he must show that he had reasonable cause to believe it.⁵ In an emergency, the passenger may be compelled to assist in working the ship; and in case of an anticipated attack from enemies, may be assigned to a position to assist in its defence. But on his refusal to obey, undue, excessive, or cruel punishment may not be inflicted upon him.⁶

§ 10. **Right of Passengers to Salvage.**—While it is the duty of the passenger, in cases of emergency, to assist in the preservation and defence of the ship so

¹ *Nieto v. Clark*, 1 Cliff. 145; *Pendleton v. Kinsley*, 3 Cliff. 416, *ante*, p. 352; *Smith v. Wilson*, 31 How. Pr. 272; *McGuire v. The Golden Gate*, 1 McAll. 104.

² *Keene v. Lizardi*, 5 La. 431.

³ *United States v. Holmes*, 1 Wall. jr. 1. This was a case of an indictment for committing manslaughter on the high seas. A ship, when distant two hundred and fifty miles from land, struck an iceberg, and began to fill so rapidly that it was evident she must soon go down. In escaping from the vessel, the first mate (the defendant), seven other seamen, and thirty-two passengers got into the long-boat. The captain, with others of the crew and one passenger, got into the jolly-boat. On the following morning, the captain, about to part company with the long-boat, gave its crew several directions, and enjoined upon them to obey all the orders of the mate as they would obey his, the captain's, which they promised to do. On account of rain and the leaking of the long-boat, those on board

soon found themselves in imminent peril. About ten o'clock on the night after the disaster to the ship, without casting lots, the defendant and the rest of the crew began to throw some of the passengers overboard, and did not cease until they had thus disposed of fourteen male passengers. Not one of the crew was cast over. It seems that the mate gave the order to begin the work of destruction. The passengers were not consulted in the matter. One asked that lots be drawn, but no attention was paid to his request, and he was sacrificed. The survivors, with the exception of two women, who seemed to have jumped overboard, were picked up by a passing vessel. The court, on the trial of the case, gave in his charge the principle stated in the text, and the defendant was found guilty of manslaughter.

⁴ *Chamberlain v. Chandler*, *ante*, p. 459.

⁵ *King v. Franklin*, 1 Fost. & Fin. 360.

⁶ *Boyce v. Bayliffe*, 1 Camp. 58.

General Rules Apply.

long as he remains on board, yet he may abandon the ship at any time he has an opportunity. If he elects to remain with the ship after such an opportunity presents itself, he is entitled to pay for services rendered by him in saving the ship. Thus, where a ship, being in danger, and the captain and part of the crew having abandoned her, a passenger, at the request of the rest of the crew, took command and brought her safely into port, it was held that the passenger was entitled to sue the owner for salvage.¹

§ 11. *Baggage of Passengers by Water.*—The general rules in respect to baggage, applicable to carriers by land, we shall elsewhere discuss.² They apply equally to carriers by water. Vessels engaged in carrying passengers are responsible for loss or damage to baggage while on board, after it has been placed in the custody of the officer whose duty it is to take care of it.³ The money paid for his passage constitutes the consideration for the safe-keeping and transportation of the passenger's baggage. If, therefore, a passenger deposits a trunk or other article of ordinary baggage with a carrier, it requires no further consideration to support the obligation to deliver it at the passenger's destination.⁴ But if unaccompanied by the passenger, it is subject to the principles of law governing the reception, transportation, and delivery of freight. A person intending to take passage on a steamboat brought his trunk on board and put it in the usual place for baggage, but did not deliver it to any one. It appeared that receipts were not usually given for baggage, and that there was no one whose particular business it was to receive baggage from passengers. Through mistake, he did not take passage, and the trunk was lost. It was held that, as he did not take passage, any custom which prevailed as to allowing passengers to deposit their baggage at a particular place without being receipted for, which might be held a delivery to the carrier of baggage, would not be a delivery of the trunk in question; because, not having taken passage, the plaintiff must show such a delivery of it to the carrier as would be necessary in the case of other freight.⁵

The carrier may contract with the passenger not to be liable for the loss of his baggage unless a receipt or bill of lading is given. In such a case, if the passenger neglects to take a receipt or bill of lading therefor, and the baggage is lost, he cannot recover for the loss.⁶ The master of a ship has a lien on the passenger's baggage for his passage-money.⁷ If a passenger does not accompany his baggage, and the baggage is received by the carrier, he may claim compensation in advance, or may postpone his claim till the delivery, and rely on his lien or on the personal responsibility of the owner; in either of which cases the carrier is responsible for the safe-keeping and delivery of the baggage.⁸

On the arrival of the vessel at her port of destination, the passenger should within a reasonable time demand his baggage. What is a reasonable time is a question which the facts in each case must determine. To go to a hotel in the vicinity of a steamboat-landing and send a porter for baggage has been held not

¹ *Newman v. Walters*, 3 Bos. & Pul. 612. And see *The Steamer Merrimac*, 1 Ben. 201; *s. c.* 1 Ben. 68. But see *The Vrede*, 1 Lush. 322.

² *Post*, Chap. XVI.

³ *Moore v. Evening Star*, 20 La. An. 402.

⁴ *The Elvira Harbeck*, 2 Blatchf. 336.

⁵ *Wright v. Caldwell*, 3 Mich. 51.

⁶ *Wilton v. Atlantic etc. Nav. Co.*, 10 C. B. (N. S.) 453.

⁷ *Wolf v. Summers*, 2 Camp. 631.

⁸ *The Elvira Harbeck*, 2 Blatchf. 336.

Notes.

to be an unreasonable delay;¹ and in a case where the passenger was put off at quarantine, and the vessel continued to her port of destination, a delay of several days in calling for the baggage was held not to be unreasonable.²

A carrier of passengers at sea may require that portion of the baggage not necessary for daily use to be deposited in any suitable place which he may designate. If the passenger prefers to take charge of his own baggage, he must assume the risk of its loss. A steerage-passenger who took his trunk into the steerage with him, placed it under his bed and fastened it with ropes to his berth, it was held, could not recover for its loss where there was no negligence shown on the part of the carrier.³ But even where the passenger retains control of his baggage, if the carrier is negligent, whereby the baggage is lost, he will be liable.⁴

What constitutes baggage, we shall consider in another place.⁵ It has been held that the bedding of a steerage-passenger, who is bound to provide his own bedding for the voyage, constitutes a part of his ordinary baggage.⁶

§ 12. *Injuries to Passengers getting on or off of a Vessel.*—The owners of vessels carrying passengers are bound to exercise the utmost diligence and the employment of every means in their power to insure the safety of passengers. They must exercise diligence not only in regard to the construction of their vessels, and the management of them after passengers have come on board, but also in providing proper means of approaching them, of ascending to and descending from them.⁷ Passengers have the right to require to be set on shore safely. The evidence in a case showed that a passenger while disembarking was walking along a stage which, on account of the high water, presented a very considerable declivity from the boat to the shore; that when a short distance from the land, a barrel of flour then under the guidance of a deck-hand got loose from his hold, or was purposely let go, and rolled down upon him, breaking one of his legs and otherwise injuring him. There was some evidence that after the barrel was let loose some one called "Look out," and one witness was sure that the passenger had time to jump from one stage to another. But the court said there should be no necessity for passengers disembarking to "look out," or to jump from one stage to another in order to save life or limb, and held that the evidence was satisfactory that the injury received by the plaintiff was the result of a reckless disregard of his safety as a passenger, and without contributory negligence on his part.⁸

If the passenger-carrier cannot maintain an absolute barrier against danger to his passengers while disembarking, it is his next duty to warn them of it; and if he omits such warning, he will be liable for any injury caused by its omission. If the passenger in such a case disregards the warning, he takes the risk of injury on himself, and so exonerates the carrier.⁹ The defendants, a dock com-

¹ *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225.

² *Gilhooly v. New York etc. Nav. Co.*, 1 Daly, 197.

³ *Cohen v. Frost*, 2 Duer, 335. See also *Clark v. Burns*, 118 Mass. 275.

⁴ *American Steamship Co. v. Bryan*, 83 Pa. St. 446.

⁵ *Post*, Chap. XVI.

⁶ *Hirschsohn v. Hamburgh etc. Packet Co.*,

2 Jones & Sp. 521.

⁷ *John v. Bacon*, L. R. 5 C. P. 437.

⁸ *Julien v. Str. Wade Hampton*, 27 La. An. 377. See also *Keokuk etc. Packet Co. v. True*, 88 Ill. 608.

⁹ *Brockway v. Lascala*, 1 Edm. 135.

Carrier must provide Facilities.

pany, provided gangways from the shore to the ships lying in their dock, the gangways being made of materials belonging to the defendants and managed by their servants. The plaintiff went on board a ship in the dock, at the invitation of one of the ship's officers, and while he was on board, the defendants' servants, for the purpose of the business of the dock, moved the gangway so that it was to their knowledge insecure. The plaintiff, without any warning from the defendants' servants, and in ignorance of its insecurity, returned along it to the shore; the gangway gave way, and he was injured. It was held that the plaintiff was entitled to recover damages from the defendants for the injuries he received.¹

But the duty to provide safe means for passengers getting on board of a vessel does not exist at such times as he is not ready to receive them, and where there is no contract or usage requiring him to be in readiness. Thus, a vessel was lying alongside a wharf of a railroad company, where she had gone to receive her cargo. There were no means devised for the reception of passengers, nor was it the custom of vessels to receive passengers there; but, on the contrary, vessels of that class had their passengers conveyed to them by means of wherries or tugs. A passenger attempted to board the vessel from this wharf by climbing up the timbers of the wharf, and thence to the vessel by a gangway, which was very narrow, and, by his own awkwardness, stumbled and fell. It was held that he was guilty of contributory negligence, and could not recover damages for the injuries thereby received.²

Evidence of the means used on other vessels, and the opinion of experts as to the excellence of those used upon the vessel where the accident occurred, will be received to show the exercise of due care on the part of the owners of the vessel where an injury occurs by reason of the alleged imperfection of the means afforded passengers to embark or disembark. It appeared that the plaintiff, a passenger on the defendant's boat, slipped and fell down the stairway of the vessel as she was disembarking, and that upon each step of the stairway of the boat was a brass plate which was corrugated except where it turned over the edge of the step, this being smooth and slippery. The plaintiff claimed that the placing of this plate upon the stairway was negligence on the part of the owners of the vessel. As it was shown that the stairs were finished in the same manner as upon the best river-boats and upon American sea-going steamers; that the boat had been in use a year, and had carried, on an average, a thousand passengers a day, and no injury of the kind had ever before occurred; and several experts had testified that this mode of covering stairs was the best in use, — it was held that the evidence failed to show negligence on the part of the defendant, and that a refusal to nonsuit the plaintiff was error.³

Where a steamboat lands at a place, to remain there for two hours, and puts out its staging to enable persons to get on and off the boat, it is not reasonable to hold that a passenger to a point further on should remain on board all the

¹ *Smith v. London etc. Docks Co.*, L. R. 3 C. P. 326. See also *John v. Bacon*, L. R. 5 C. P. 437.

² *The Ship Anglo-Norman*, 4 Sawyer, 185.

³ *Crocheron v. North Shore etc. Ferry Co.*, 56 N. Y. 656 (reversing *s. c.* 1 *Thomp. & C.* 446). See also *Crafter v. Metropolitan R. Co.*, ante, p. 88. For cases of alleged negligence

on the part of owners of vessels in the construction of the means used for the ingress and egress of passengers, see *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306 (overruling *s. c.* 5 Hun, 523); *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1. See also *Grieve v. Ontario etc. Steamboat Co.*, 4 Upper Canada C. P. 387.

Notes.

time of the stay; and by attempting to go on shore, observing due prudence and care, he will not be guilty of any wrong or negligence depriving him of a right of recovery for a personal injury carelessly or recklessly inflicted on him by the employees of the boat.¹

§ 13. **Rights of Passengers *inter se* to Berths on Steamboats.**—In an action in which one of the questions between the parties was whether the defendant was justified in expelling the plaintiff from a berth in a steamer, it was proved that the plaintiff placed his coat upon the berth while it was vacant, afterwards applied at the office of the company to which the steamer belonged, for the purpose of engaging the berth, and caused the company's agent or clerk then in attendance at the office to enter his (the plaintiff's) name on the way-bill opposite the number of the berth, but that, the defendant having also applied for the same berth, another agent or clerk of the company altered the way-bill by inserting the defendant's name opposite the berth and allotting another one to the plaintiff, and that the plaintiff, upon returning to the berth in dispute, after the steamer had started, found the defendant's servant at the door, who refused to allow him to enter. The plaintiff afterwards entered the berth, and was removed by the defendant. Evidence was also given that, according to the usage on board the steamer, the rights of the passengers *inter se* to berths during the voyage were to be determined by the way-bill as finally settled and sent on board, and that disputes during the voyage with respect to passengers' accommodation should be decided by the captain or steward. It was held that the plaintiff was not entitled to a direction that he was in possession of the berth in dispute; that the way-bill as finally settled and delivered to the officers on board determined the right to the berth as between the plaintiff and the defendant; and that the jury having found that the way-bill, as finally settled for the purpose of the voyage, allotted the berth to the defendant, and that the defendant was in possession thereof at the time of the alleged assault, he was justified in removing the plaintiff, without using unnecessary violence, upon his refusal to leave the berth.²

§ 14. **Duty of Carrier as affected by Quarantine.**—A voyage from one seaport to another is not completed at the quarantine of the port of destination; and unless excused by special agreement, or by the health-laws preventing intercourse with the city, the vessel is bound to carry a passenger and his baggage to the point agreed on.³ If, on the arrival at port, the city authorities find it necessary, in order to prevent the spreading of a contagious disease which exists on board of a vessel, to have the sick passengers sent to the hospital to be treated, the owners of the vessel cannot be made liable for the expenses thereby incurred.⁴

§ 15. **Limitation of Liability by English Merchants' Shipping Act.**—By an English act⁵ designed to encourage the investment of capital in ships, the lia-

¹ Keokuk etc. Packet Co. v. True, 88 Ill. 608.

² Dysart v. Montgomery, Irish Rep. 8 C. L. 245.

³ Gilhooly v. New York etc. R. Co., 1 Daly, 197.

⁴ New Orleans v. The Windermere, 12 La. An. 84.

⁵ Merchants' Shipping Act, 1854, 17 & 18 Vict., c. 104; Amendment Act, 1862, 25 & 26 Vict., c. 63.

 Historical Sketch.

bility of owners of ships for damages caused by certain accidents happening to such ships was limited to an aggregate amount not exceeding £15 for each ton of their ship's tonnage. It appeared in a case where a railroad company also the owner of a ship had contracted to carry a passenger and his luggage from London to Guernsey partly by rail and partly by water, that the vessel upon which the passenger and his luggage were being carried sunk. The passenger brought an action for the loss of his luggage and for delay. In an action under the statute to restrain the suits thus brought and to have the Court of Chancery distribute amounts due the several parties injured by the sinking of the vessel, it was contended that, as the passenger had bought his ticket in London, it was a contract of carriage to which the Merchants' Shipping Act did not apply; that the ticket in question was bought from a railroad company, with whom the contract to carry was made, while the act limiting the liability only applied to ship-owners; but the court held otherwise, and the actions were restrained, except those for delay.¹

§ 16. **Parties to Action in Case of Injury to Passenger from Collision of Vessels.** — Where a collision between two vessels results from the fault of both, a passenger on one of them sustaining injuries from the collision may recover damages against both vessels, and they may be proceeded against in the same libel. The damages recovered in such a case may be apportioned by the decree equally between the two vessels; and at the same time the right may be reserved to the libellant to collect the entire amount of either of them, in case of the inability of the other to respond for her portion.²

§ 17. **United States Statutes affecting Carriers of Passengers by Water.** — (1.) *Historical Sketch of Statutes.* — It is well understood that the exclusive power has been conferred upon Congress in respect to the regulation of commerce between the several States. Beyond all doubt, the power as conferred includes navigation as well as traffic, and it is equally well settled that it extends to ships and vessels exclusively employed in conveying passengers as well as those engaged in transporting goods and merchandise.³ Congress has at various times exercised its prerogative in this particular. In 1838 it passed an act "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam."⁴ This act provided for the appointment of inspectors whose duty it was at stated intervals to examine the hull, boilers, and machinery of vessels within the act. It further directed the employment of a competent number of experienced and skilful engineers, and prescribed rules for the operation of such vessels, made provision for life-saving apparatus proportioned to the tonnage of vessels, and adopted measures for the control of fires by requiring each vessel to provide as a part of its machinery fire-

¹ London etc. R. Co. v. James, L. R. 8 Ch. 241.

² The Washington and the Gregory, 9 Wall. 513 (affirming s. c. 2 Ben. 226). See also The Milan, Lush. 388. For cases deciding the question of jurisdiction of admiralty courts, see Chisholm v. Northern Transp. Co., 61 Barb. 363; Dougan v. Champlain

Transp. Co., 56 N. Y. 1; City of Brussels, 6 Ben. 370; Steamboat Ottawa, 1 Newb. Adm. 536; Swarthout v. New Jersey Steamboat Co., 48 N. Y. 209.

³ Per Clifford, J., in Hall v. De Cuir, 95 U. S. 485, 491, citing Gibbons v. Ogden, 9 Wheat. 1.

⁴ Act 1833, chap. 191, 5 Stats. at Large, 301.

Notes.

extinguishing apparatus. Penalties were provided for violation of the provisions of the act, and the officers and employees whose negligence or misconduct resulted in the loss of lives of passengers were declared guilty of manslaughter, punishable, upon conviction in any Circuit Court of the United States, by confinement at hard labor for a period not exceeding ten years. And finally, it enacted that in suits against the proprietors of steamboats for injuries to the person or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such accident should be taken as full *prima facie* evidence sufficient to charge the defendant with negligence, until the defendant should show that there was no negligence on his part or that of his employees.

The foregoing act was followed by another in 1843,¹ which modified the effect of the former act in some few details. In 1852,² an act was passed "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." By this act the policy of the previous acts was greatly extended, and the result was quite an elaborate set of provisions having in view the purpose of the title. This was followed by brief resolutions upon this matter,³ and in 1855⁴ by "an act to regulate the carriage of passengers in steamships and other vessels," and by other acts furthering the purposes of preceding acts,⁵ until, in 1871,⁶ an act was passed consolidating the provisions of previous acts, and expressly repealing certain other acts.⁷

(2.) *Condensed Statement of the Provisions of the Act of February 28, 1871.*—This act provides for the appointment of a supervising inspector-general under the direction of the secretary of the treasury, to superintend the administration of the steamboat-inspection laws, and, among other things, preside at the annual meetings of a board of ten supervising inspectors. The supervising inspectors

¹ Act 1843, chap. 94, 5 U. S. Stats. at Large, 626.

² Act 1852, chap. 106, 10 U. S. Stats. at Large, 61.

³ Resolution of Jan. 7, 1853, No. 5, 10 U. S. Stats. at Large, 261; Resolution of March 3, 1853, No. 13, 10 U. S. Stats. at Large, 262.

⁴ Act 1855, chap. 213; 10 U. S. Stats. at Large, 715. It will be noticed that this act does not relate to steam-vessels exclusively, but to the carriage of passengers upon merchant vessels as well. The first act upon this subject was passed in 1819. 3 U. S. Stats. at Large, 488, chap. 46. This act limited the number of passengers to be carried in proportion to the ship's tonnage, and prescribed forfeitures for the carriage of passengers in excess of the ratio of two for every five tons; the amount of stores to be shipped for each passenger, and a penalty for putting passengers upon a short allowance; that a list of all the passengers be delivered to the collector, etc., showing the age, sex, and occupation of passengers, the country to which they belonged, where

they meant to reside, together with the number dying upon the voyage. This act, and later acts passed upon the same subject (Act 1847, chap. 16, 9 U. S. Stats. at Large, 127; Act 1847, chap. 34, 9 U. S. Stats. at Large, 149; Act 1848, chap. 7, 9 U. S. Stats. at Large, 210; Act 1848, chap. 41, 9 U. S. Stats. at Large, 220; Act 1849, chap. 111, 9 U. S. Stats. at Large, 399), were all expressly repealed by the act of 1855.

⁵ Act 1864, chap. 113, 13 U. S. Stats. at Large, 120; Act 1864, chap. 249, 13 U. S. Stats. at Large, 390; Act 1865, chap. 94, 13 U. S. Stats. at Large, 514; Act 1866, chap. 234, 14 U. S. Stats. at Large, 227.

⁶ Act 1871, chap. 100, 16 U. S. Stats. at Large, 440. See also U. S. Rev. Stats., §§ 4399-4500.

⁷ Act 1838, chap. 191, 5 U. S. Stats. at Large, 304; Act 1843, chap. 91, 5 U. S. Stats. at Large, 626; Act 1852, chap. 106, 10 U. S. Stats. at Large, 61; Act 1864, chap. 78, 13 U. S. Stats. at Large, 63; Act 1864, chap. 113, 13 U. S. Stats. at Large, 120; Act 1865, chap. 94, 13 U. S. Stats. at Large, 514; Act 1866, chap. 234, 14 U. S. Stats. at Large, 227.

Act of February 28, 1871.

have control of local boards of inspectors within their several districts, and it is the business of the former to examine into the doings of the latter, visit any vessels licensed under the act, when they shall deem fit, to ascertain whether the statutory provisions are observed by local inspectors and the officers of the vessels. All vessels propelled in whole or in part by steam, navigating any waters of the United States which are common highways of commerce or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, are declared to be subject to the provisions of the act.

It is the duty of the board of supervising inspectors before mentioned to establish regulations to be observed by all steam-vessels in passing each other. The act provides for the appointment of inspectors of hulls and boilers in certain collection districts named. It is the duty of these officers to make at least an annual inspection of the hulls and boilers of vessels within their districts, satisfy themselves that the vessel is suitable for the service in which she is to be employed; that there are suitable accommodations for passengers and the crew; that all the requirements of the law in regard to fires, boats, pumps, hose, life-preservers, floats, anchors, cables, and other things are faithfully complied with. The boilers are to be subjected to hydrostatic pressure, and the inspectors are to satisfy themselves in a great number of stated particulars that the vessel may be used in the service proposed, without peril to life. Having finished their inspection, it is the duty of these officers, if the result is satisfactory, to make and subscribe and verify by oath a certificate to this effect to the collector or other chief officer of the customs of the district, two copies of which shall be placed in conspicuous places in the vessel, where they will be most likely to be observed by passengers and others, and there kept at all times framed under glass.

The act proceeds to provide penalties for the carriage of gunpowder upon vessels engaged in carrying passengers, without the authority of a certificate of the inspectors for carrying it in a specified manner; for the improper and unlawful construction of boilers; for counterfeiting the marks and stamps for boiler-iron or steel plates required by the act; for intentionally loading or obstructing the safety-valve of a boiler, or employing any device whereby the boiler is subjected to a greater pressure than the amount allowed; for intentionally deranging or hindering the operation of any machinery or device employed to denote the state of the water or steam in the boiler, or to give warning of approaching danger; or for intentionally permitting the water to fall below the prescribed low-water line of the boiler.

Provision is also made for licensing and classifying the masters, chief mates, engineers, and pilots of all steam-vessels by the local inspectors, and for the revocation or suspension of such license upon satisfactory proof of the unfitness of the licensee to act under such authority. No person is permitted to serve as master, chief mate, engineer, or pilot on any steamer, who is not so licensed by the inspectors.

It is also enacted that no steamer carrying passengers is permitted to depart from any port unless having a full complement of licensed officers and a full crew; that no greater number of passengers shall be taken on board than is

Notes.

stated in the certificate of inspection; that the master of every passenger-steamer shall keep a correct list of all the passengers received and delivered from day to day, noting the places where received and where landed; that every steamer carrying passengers or freight shall be supplied with stated means for the prevention of and extinguishing of fire; that certain enumerated dangerous articles shall neither be carried as freight nor used as stores on passenger steamers, and others of a like character to be carried only upon certain conditions; that life-preservers or floats shall be provided in numbers equal to the number of passengers which the steamer is entitled to carry; that convenient means of exit shall be provided for passengers, which shall not be interfered with by the stowage of freight; that life-boats, metallic and otherwise, shall be provided according to the needs of each vessel.

Finally, it is provided that whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured, to the full amount of damage, if it happens through any neglect or failure to comply with the provisions of the act, or through known defects or imperfections of the steaming apparatus or of the hull; that any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of any master, mate, engineer, or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer, or pilot, and recover damages for any such injury caused by him.

All of the requirements of this act to which we have thus briefly alluded are set out with many elaborate details, together with ancillary and other provisions which we have not space to notice.

(3.) *Condensed Statement of the Provisions of the Act of March 3, 1855.*—It will be observed that of all the acts mentioned in the historical sketch at the beginning of this section, that of the year 1855¹ is the only one not expressly repealed by the act of 1871, to which we have just given extended notice. The provisions of this act are incorporated in the Revised Statutes,² to which brief allusion will be made. This act provides that no master of any vessel owned in whole or in part by a citizen of the United States, or by a citizen of a foreign country, shall take on board at any foreign port or place, other than foreign contiguous territory of the United States, passengers otherwise than in accordance with the provisions of the act, with intent to bring such passengers to the United States. The provisions of the act specify that the number of passengers carried shall be in a stated proportion to the tonnage of the vessel; that each passenger shall be entitled to a certain amount of shiproom for himself and personal baggage, which in no case shall be occupied by stores or other goods; that berths of given dimensions shall be constructed; certain provisions shall be made for ventilation of that part of the vessel occupied by those other than cabin passengers; that a cooking-range shall be constructed in size proportioned to the number of passengers carried; that supplies of a kind and quantity named, and of good quality, shall be laid in for the consumption of passengers; that the food of the passengers shall be properly cooked daily, and served at regular

¹ Act 1855, chap. 213, 10 U. S. Stats. at Large, 715.

² §§ 4252-4272.

 Act of March 3, 1855.

hours; that in case the passengers are put upon short allowance by reason of a failure to comply with the provisions of the act, the master or owner of the vessel shall pay to each of such passengers the sum of \$3 for each day while upon such short allowance; that the master of the vessel may maintain good discipline and such habits of cleanliness among passengers as will tend to the preservation of health, and where the apartments of the passengers become foul from any cause, he is charged with the duty of purifying them with disinfectants.

As to vessels bound from any port in the United States to any port or place in the Pacific Ocean or on its tributaries, or from any such port or place to any port in the United States on the Atlantic or its tributaries, including vessels whose passengers, or any part of them, shall be bound from or to any of those ports or places by way of any overland route through Mexico or Central America,—these are declared subject to the foregoing provisions, except so much as regards food and water, as to which the master is not obliged to lay in any specified supply, but to furnish “a sufficient supply of good and wholesome food, properly cooked,” under the same penalty for putting passengers upon a short allowance.

By the same act it is made the duty of the master of any vessel arriving in the United States from any foreign place whatever to deliver to the collector of the district in which it arrives a list of all the passengers taken on board, with stated queries as to each passenger answered, and further to set forth the number which have died on the voyage, which list shall be verified by the oath of such officer. For each of such passengers as have died on the voyage by natural disease, being above the age of eight years, the master, owner, or consignee is bound to pay the collector the sum of \$10, which money is devoted to the care and protection of sick, indigent, or destitute emigrants.

Having already exceeded the space which we had intended to devote to this subject, we will pass to a review of the decisions which have been rendered upon the statutes to which we have alluded in the foregoing. In another connection we found it convenient to briefly notice certain of these statutes, and to avoid iteration will not discuss the effect of cases there stated.¹

(4.) *Review of Cases construing the foregoing Acts.*—(a.) *The Act of March 2, 1819.*—Under the act of 1819,² a vessel was deemed forfeited to the United States if the number of persons transported exceeded the proportion of two to every five tons of the vessel's tonnage, by twenty. In estimating the number of passengers under the act, no deduction was made for children or persons not paying; but those employed in navigating the vessel were not included.³

(b.) *The Act of March 3, 1855.*—The provisions of the second section of the act of 1855,⁴ in relation to the number and arrangement of berths, have been construed as having no application to steamships.⁵ Under this same statute,⁶ a mate who is appointed master at a foreign port, and leaves the port with intent to bring certain passengers to the United States, and does bring them in excess

¹ *Ante*, p. 222, § 14.

² Chap. 46, § 2, 3 U. S. Stats. at Large, 488.

³ *United States v. The Louisa Barbara*, Gilp. 332. See also *United States v. The Neurea*, 19 How. 92 (construing the act of

1847, chap. 16, 9 U. S. Stats. at Large, 127).

⁴ Chap. 213, 10 U. S. Stats. at Large, 715.

⁵ *The Manhattan*, 2 Ben. 88; s. c. 7 Int. Rev. Rec. 28.

⁶ § 1.

Notes.

of the number permitted by that statute, is liable to the fine imposed on masters, though the agreement with the passengers was made by the former master, if the defendant had knowledge of the facts, and opportunity to annul the illegal contract before leaving the foreign port.¹ But the mere intention to violate the law, formed in a foreign country, and not completed by illegal importation, is insufficient to produce conviction.²

(c.) *The Act of July 7, 1838, and August 30, 1852.*—It was stated by Mr. Justice NELSON, in a leading case, that it was *gross negligence*³ not to comply with the provision of the act of 1838⁴ requiring steam-vessels to provide as a part of their necessary furniture a suction-hose and fire-engine, and hose suitable to be worked in case of fire, and to carry the same on every trip in good order; and further, that iron rods or chains should be employed and used in the navigation of steamboats, instead of wheel or tiller ropes.

The provision of this act⁵ making the bursting of a boiler, or other injurious escape of steam, *primâ facie* evidence of negligence on the part of the defendant, in an action for such injuries, has received the attention of the United States courts in two cases. In *Steamboat New World v. King*,⁶ an explosion took place upon one of two boats engaged in a race for patronage. CURTIS, J., said in this case: "When a disastrous explosion has occurred in such a strife, this court cannot treat the evidence of those engaged in it, and *primâ facie* responsible for its consequences, as sufficient to disprove their own negligence, which the law presumes."⁷ In another case, CHASE, C. J., said upon this point: "To repel the inference of negligence in this case, then, there must be such clear proof of care and vigilance as will exclude any reasonable belief that there was any negligence whatever on the part of the owners, or any of their employees, which contributed to the explosion."⁸

The provision under discussion was not impliedly repealed by the thirtieth section of the act of 1852.⁹ The averment of a strict compliance on the part of the proprietors of steamboats with all the requirements of the act, without averring care and denying negligence, is not a good defence to the allegation of loss by an explosion caused by negligence.¹⁰ The act of 1852 did not exempt the owners and master of a steam-vessel, and the vessel, from liability for injuries caused by the negligence of its pilot or engineer, but made them liable for all damages sustained by a passenger or his baggage from any neglect to comply

¹ *United States v. Morton*, 1 Low. 179.

² *United States v. The Anna*, 2 Am. L. Reg. 421.

³ *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 385. To the same effect is the frequently quoted language of Mr. Justice Grier in the leading case of *Phila. etc. R. Co. v. Derby*, 14 How. 468, 486; *s. c. ante*, p. 31. See also the approval of Mr. Justice Curtis, in *Steamboat New World v. King*, 16 How. 469, 474, *ante*, p. 175.

⁴ Chap., 191, § 9, 5 U. S. Stats. at Large, 304, 306.

⁵ § 13.

⁶ 16 How. 469, *ante*, p. 175.

⁷ 16 How. 477.

⁸ *The Highland Light*, Chase's Dec. 150, 153.

⁹ Chap. 106, 10 U. S. Stats. at Large, 61. *Curran v. Cheeseman*, 1 Cin. Superior Ct. 52; *Steamboat New World v. King*, 16 How. 469, *ante*, p. 175. The provisions of the thirtieth section of the act of 1852 are almost identical with those of the forty-third section of the act of 1871 (U. S. Rev. Stats., § 4493), which is set out at length in a previous chapter of this book. See p. 223, *ante*.

¹⁰ *Curran v. Cheeseman*, *supra*; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, 292; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 141.

Act of July 4, 1864.

with the provisions of the law, no matter where the fault might lie; and in addition to this remedy, any person injured by the negligence of the pilot or engineer might have his action directly against those officers.¹

The provision of the act of 1838,² requiring steamboats transporting passengers to operate under a license for this purpose, was held to have been violated by a propeller (which was usually engaged in and about a harbor as a tug-boat exclusively) carrying passengers for hire upon a single trip, without the authority of such a license. The exception contained in the act of Congress of 1852³ was held to authorize the carriage of passengers without a license only while employed in the legitimate business of towing, etc.; but not where the boat leaves that business for the purpose of transporting passengers.⁴ A contrary conclusion was reached in another case.⁵

The penalty provided by the act of 1838⁶ for transporting goods, wares, and merchandise on vessels not inspected was not embraced in the act of 1852.⁷ The whole object and scope of this last act was to provide for the better security of the lives of passengers, and it provided a full and perfect system for the inspection of the hulls and boilers of vessels propelled in whole or in part by steam, and *carrying passengers*. Therefore it was held that such a vessel was not liable to the penalty mentioned for transporting goods, wares, and merchandise without inspection of the hull and boilers, the provision of the earlier act in this particular being inconsistent with and repealed, by implication, by the later act.⁸ Neither was a steamboat employed in transporting passengers between ports in the same State liable to the penalty prescribed by the act of 1852, such a vessel being exclusively within and subject to State regulations and control.⁹ Steamers used as ferry-boats were in express terms exempted from the operation of the act of 1852.¹⁰

(*d.*) *The Act of July 4, 1864.*—The following provision of an act of Congress¹¹ was held to be imperative, and a strict compliance with its demands necessary: "That the secretary of the treasury shall cause to be prepared a synopsis of such of the laws relating to the carriage of passengers and their safety on vessels propelled in whole or in part by steam as he shall think expedient, and have the same printed in convenient form to be framed under glass,

¹ *Sherlock v. Alling*, 93 U. S. 99. The forty-third section of the act of 1871 (*ante*, p. 223; U. S. Rev. Stats., § 4493) is, as we have previously stated, almost identical with the thirtieth section of the act of 1852, and the same construction has been put upon it as upon the latter act in the case just noticed. *Brown v. The D. S. Cage*, 1 Woods, 401.

² § 2.

³ Act 1852, chap. 106, § 42, 10 U. S. Stat. at Large, 61, 75.

⁴ *United States v. The Echo*, 4 Blatchf. 446; s. c. 20 How. Pr. 517; *United States v. The Thomas Swan*, 9 Law Rep. (N. s.) 201.

⁵ *United States v. The Ottawa*, Newb. Adm. 536. See also *The Morning Star*, 4 Bias. 62.

⁶ § 2.

⁷ Chap. 106, 10 U. S. Stats. at Large, 61.

⁸ *United States v. The Sun*, 1 Am. L. Reg. (N. s.) 277.

⁹ *United States v. The Seneca*, 1 Am. L. Reg. (N. s.) 281; *United States v. The James Morrison*, Newb. Adm. 241; *United States v. The William Pope*, *id.* 256; *United States v. The Bright Star*, 7 Int. Rev. Rec. 179; *The Thomas Swan*, 6 Ben. 42. But see *The Daniel Ball*, 10 Wall. 557; *Warren v. Clark*, 5 How. 441, 465, per Wayne, J.; *Bradley v. Northern Transp. Co.*, 15 Ohio St. 553, 557.

¹⁰ Chap. 106, § 42, 10 U. S. Stats. at Large, 75; *Elizabethport etc. Ferry Co. v. United States*, 5 Blatchf. 198; *The Sylph*, 4 Blatchf. 24.

¹¹ Act 1864, chap. 249, § 8, 13 U. S. Stats. at Large, 390, 391.

Notes.

and give to any such vessel two copies, on application of its owner or master, who shall without unnecessary delay have the same framed under glass, and place and keep them in conspicuous places in such vessel," etc. Under this section it was held to be no defence that the surveyor of the port was not supplied with these documents, wherefore the steamer put out without them, but procured one while upon her trip, which was duly posted up. The owners were bound at their peril to apply for them to the secretary of the treasury; otherwise, proceeding upon the voyage as they did, the penalty named in the act was incurred.¹

(e.) *The Act of July 25, 1866.*—It was provided by the act of 1866,² "that cotton, hemp, hay, straw, or other easily ignitable commodity, shall not be carried on the decks or guards of any steamer carrying passengers, except on ferry-boats crossing rivers, and then only on the sterns of such boats, unless the same shall be protected by a complete and suitable covering of canvas or other proper material to prevent ignition from sparks, under a penalty," etc. In a case arising under this provision, it was held that hay in bales, piled up in the engine or deck room, back of the engines, and surrounded and protected by a tier of grain in sacks (made of burlaps, or jute cloth) on each side, and two or more tiers on each end, and extending from the floor to the carlings or ceiling, and stripped with plank to make the sacks steady, was a sufficient compliance with this statute.³

(f.) *The Act of February 28, 1871.*—The fourth section of the act of 1871⁴ provides, among other things, that no refined petroleum shall be carried as freight on any steamer carrying passengers, with an exception not necessary to notice; but the section provided no penalty for the violation of the provision. The sixty-eighth section of the act declares that the penalty for the violation of any provision of the act not otherwise specially provided for shall be a fine of \$500, one-half for the use of the informer. These sections alone clearly would not authorize a proceeding *in rem*. The proper remedy is an action of debt.⁵ The first section, however, makes provision for the licensing and enrolment of steam-vessels, and concludes, that "if any such vessel shall be navigated without complying with the terms of this act, the owner or owners thereof shall forfeit and pay," etc., "for which sum the steamboat or vessel so engaged shall be liable, and may be seized," etc. The remedy contemplated by this section cannot by implication be extended to the fourth section.⁶

¹ The Lewellen, 4 Biss. 156.

² Act 1866, chap. 234, § 5, 14 U. S. Stats. at Large, 227.

³ Union Insurance Co. v. Shaw, 2 Dill. 14. In this case the point was reaffirmed, as decided by Mr. Justice Catron and District Judge Wells in this circuit in 1855, to the effect that the tenth section of the act of 1852 (chap. 106, 10 Stats. at Large, 61, 69) had no application to steamboats plying on the Mississippi River.

⁴ Act 1871, chap. 100, 16 U. S. Stats. at Large, 440.

⁵ Woods, J., in United States v. The C. B. Church, 1 Woods, 275, citing Stockwell v.

United States, 13 Wall. 542; Jacob v. United States, 1 Brocken. 520; Rex v. Robinson, 2 Burr. 803; United States v. Simms, 1 Cranch, 252.

⁶ United States v. The C. B. Church, 1 Woods, 275; The J. D. Parker, 23 Int. Rev. Rec. 66. To the same effect is The Highland Light, Chase's Dec. 150. See also The Candace, 1 Low. 126, where it is held that § 15 of the act of 1855 (chap. 213, 10 U. S. Stats. at Large, 715, 720), which enacts "that the amount of the several penalties imposed by the foregoing provisions * * * shall be liens on the vessel or vessels violating these provisions," does not apply to the fine im-

Act of March 3, 1851.

(5.) *Limitation of Carrier's Liability by the Act of March 3, 1851.*—We have reserved for consideration at this point, and apart from the foregoing, the statute of 1851,¹ because the object of this statute is essentially unlike that of any of the foregoing which we have noticed. This statute is "An act to limit the liability of ship-owners, and for other purposes." Its provisions are substantially incorporated into the Revised Statutes, and their brevity and importance seem to justify us in setting them out at length.² In the course of his opinion

posed on the master by § 1 of that act, upon his conviction of a misdemeanor, but only to the civil penalties imposed on owners as well as masters, by §§ 2 and 8 of the act, for a violation of §§ 2, 3, 4, 5, and 7. In *United States v. Laurel*, Newb. Adm. 209, it was held that the expression in § 2 of the act of 1838 (chap. 191, 5 U. S. Stats. at Large, 304), "for which sum or sums the steamboat or vessel so engaged shall be liable," was simply used to give a remedy against the boat by libel, and was not intended to give a lien, expressed or implied.

¹ Chap. 43, 9 U. S. Stats. at Large, 635.

² "§ 4281. If any shipper of platina, gold, gold-dust, silver bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or time-pieces of any description, trinkets, orders, notes or securities for the payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered.

"§ 4282. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel,

unless such fire is caused by the design or neglect of such owner.

"§ 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending.

"§ 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and [owner] [owners] of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings, in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

"§ 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.

"§ 4286. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title relating to the

Notes.

in the case of *Railroad Company v. Lockwood*,¹ Mr. Justice BRADLEY concisely summarized the provisions of this act, and concluded by saying: "This seems to be the only important modification of previously existing law on the subject, which in this country has been effected by legislative interference. And by this it is seen that, though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employees, and liable without limit for his own negligence."²

The policy of this act is explained by Mr. Justice CATRON in the leading case of *Moore v. American Transportation Company*:³ "Our act of Congress," said he, "of March 3, 1851, was passed to put our commercial marine on an equal footing with that of Great Britain; so that the increase of the number of ships, and the navigation of them, might be equally encouraged. That competition with British shipping was the object of Congress, is manifest to my mind from the fact that the provisions of our statutes correspond to British statutes."⁴

(a.) *Scope of this Act.*—One of the first cases arising under this act was that of *Moore v. American Transportation Company*.⁵ It was here decided that the navigation of Lake Erie, and also of all the other lakes in connection therewith, is not within the exception to this act, as falling within the words "inland navigation."⁶ Mr. Justice CATRON dissented, but the judgment of the majority of the court in this case has ever since been adhered to as the proper construction of the act.⁷

In *Walker v. Transportation Company*,⁸ the terms of the first section⁹ of the act came up for construction. The plaintiff shipped a cargo of grain at Chicago, on a vessel belonging to the defendants, to be delivered at Buffalo. The vessel caught fire and the grain was consumed. The company set up as a

limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

"§ 4287. Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise or property put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part-owner of the vessel.

"§ 4288. Any person shipping oil of vitriol, unslaked lime, inflammable matches, or gunpowder, in a vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the

vessel, shall be liable to the United States in a penalty of one thousand dollars. But this section shall not apply to any vessel of any description whatsoever used in rivers or inland navigation.

"§ 4289. The provisions of [*this title*] the seven preceding sections, relating to the limitation of the liability of the owners of vessels, shall not apply to the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation."

¹ 17 Wall. 357; s. c. *ante*, p. 378.

² *Id.* 361.

³ 24 How. 1, 40.

⁴ See also *Walker v. Transportation Co.*, 3 Wall. 150, 152; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 142; *Chamberlain v. Western Transp. Co.*, 44 N. Y. 305, 308.

⁵ 24 How. 1.

⁶ § 7; Rev. Stats., § 4289, *supra*. This point arose in an earlier case, but was not decided. *The Niagara v. Cordes*, 21 How. 7.

⁷ *Walker v. Transportation Co.*, 3 Wall. 150; *Chamberlain v. Western Transp. Co.*, 44 N. Y. 305.

⁸ 3 Wall. 150.

⁹ Rev. Stats., § 4282, *supra*, p. 483, note.

Act of March 3, 1851 — Passenger's Baggage.

defence to the plaintiff's suit, that the wheat was destroyed by a fire which was not caused by the "design or neglect" of the defendant. MILLER, J., delivering the opinion of the court, held this to be a good defence. "When we consider," said he, "that the object of the act is to limit the liability of *owners* of vessels, and that the exception is not, in terms, of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners."¹ So, where a libel was filed to recover damages for injuries to goods by fire caused by the alleged negligence of the master who was also a part-owner, but not by the design or neglect of the other part-owners, it was held that such part-owners personally, and also their interests in the vessel, were exempted from liability.²

(b.) *Application to Passenger-Carriers in respect of Passengers' Baggage.*— A most interesting question in connection with the subject of this book is whether carriers of passengers can take advantage of the provisions of this act in relation to their liability for the safe transportation of the baggage of their passengers. Upon this point we find no adjudication in the Federal courts. The question, however, has been considered in two of the most eminent State jurisdictions, and contrary conclusions have been reached. In *Dunlap v. International Steamboat Company*,³ the action was tort for the value of a valise and its contents, lost from the custody of the defendants. The valise contained 86 sovereigns in British coin and \$393 in gold coin of the United States belonging to the plaintiff, besides other coin, the property of a companion. It did not appear that any notice was given to the defendants, or to any of their agents or servants, that the valise contained gold, or any article of peculiar value. The second section⁴ of the act was set up in defence to the action. It was held that the statute had no application to the case. BIGELOW, C. J., said: "We are of opinion that the provisions of the United States Statute of 1851, chap. 43, § 2, on which the defendants rely in bar of these actions, do not apply to contracts entered into with masters or owners of vessels for the carriage, by water, of passengers with their luggage. The manifest design of the statute was to restrict the liability of common carriers by water, of certain kinds of goods and merchandise. In regard to these it changes the rule of the common law. For this reason, its provisions are not to be extended by implication. Giving to the phraseology of the statute its fair and full meaning, without enlarging it by construction, it indicates quite clearly that its framers intended to embrace only that class of contracts where goods are shipped and laden on board of vessels to be transported as freight, for which bills of lading are usually given by the carrier and received by the shipper, and form the evidence of the terms on which the contract of carriage is to be performed. The contracts on which the plaintiffs rely are not within the provisions of the statute."⁵

The contrary conclusion was reached by the Court of Appeals of New York in *Chamberlain v. Western Transportation Company*.⁶ The action was brought by the plaintiff as assignee, to recover for the value of some passengers' baggage destroyed with the defendant's vessel. The cause of the fire was unknown. The

¹ 3 Wall. 153. See also *Chisholm v. North-ern Transp. Co.*, 61 Barb. 363.

² *Keene v. The Whistler*, 2 Sawyer, 348.

³ 98 Mass. 371.

⁴ Rev. Stats., § 4281, *supra*, p. 483, note.

⁵ 98 Mass. 375. To the same effect is *Brock v. Gale*, 14 Fla. 523, 535.

⁶ 44 N. Y. 305.

Notes.

defendant claimed to be protected against any recovery in this action by virtue of the first section of the act,¹ but the plaintiff contended that the baggage in question was not "goods or merchandise" within the meaning of this section, and hence that the defendant was under the common-law liability. The trial court directed a verdict for the plaintiff, subject to the opinion of the general term, which subsequently ordered judgment for the plaintiff.² In the Court of Appeals this judgment was reversed. EARL, C. J., said: "This is not in any sense a penal statute, nor is it in any way derogatory to natural right, and hence I know of no rule of law that requires that it should be strictly construed. It is true that it changes the common law, but there can be no reason for applying the rule of strict construction to the vast body of statute laws which change the common law. The prior law, whether it be statute or common law, is to prevail unless the subsequent statute, by a fair or proper construction, repeals or modifies it. This statute is rather a remedial statute. It was enacted to remedy the rigor of the common law, which it was deemed unwise, on grounds of public policy, to continue. It should therefore be construed, if not liberally, at least fairly, to carry out the policy which it was enacted to promote."³ The learned judge then proceeded to apply familiar rules of construction deduced from adjudicated cases,⁴ and examining the act as a whole, concluded that "there is no reason for believing that the law-makers meant by the language used in the subsequent sections to include baggage, and not to include it in the words 'any goods or merchandise whatsoever,' used in the first section."⁵ A similar conclusion was reached in a case arising under the English Merchants' Shipping Act of 1854.⁶

In a late case before the Supreme Court of the United States, an effort was made to bend § 4281⁷ of the Revised Statutes to an extraordinary purpose, viz., to exempt a railroad company from liability for the theft of valuable laces from the trunk of a passenger while in the charge of the company. These laces constituted a part of the wearing apparel of the passenger, and were properly a part of her baggage. The company had no knowledge of their being in the trunk, and no extra compensation was paid for the carriage of the trunk. The court held that the section in question had no application whatever to the case, but referred alone to the liability of carriers by water who transport goods and merchandise of the kind designated.⁸

(c.) *Jurisdiction in certain Cases.*—A question of jurisdiction has at different

¹ Rev. Stats., § 4282, *supra*, p. 483, note.

² See 45 Barb. 218.

³ 44 N. Y. 309.

⁴ Citing *Maillard v. Lawrence*, 16 How. 251; *United States v. Coombs*, 12 Pet. 72; *James v. Patten*, 6 N. Y. 9; *Pillow v. Bushnell*, 5 Barb. 156; *United States v. Freeman*, 3 How. 556, 565; *Waller v. Harris*, 20 Wend. 555-561.

⁵ It will be noticed that in the Revised Statutes the language of this section is amended so as to read, "any merchandise whatever." It would seem that with the omission of the word "goods," this section cannot bear the construction adopted in this case.

⁶ 17 & 18 Vict., c. 104, § 503. The language of this section, corresponding to § 1 of the act of 1851, is as follows: "No owner of any sea-going ship, or share therein, shall be liable to make good any loss or damage that may happen without his actual fault or privity, of or to any of the following things (that is to say): (1.) Of or to any goods, merchandise, or other things whatsoever taken in or put on board any such ship, by reason of any fire happening on board such ship." *McDougall v. Allan*, 6 Lower Canada Jur. 233.

⁷ *Supra*, p. 483, note.

⁸ *New York etc. R. Co. v. Fraloff*, 9 Cent. L. J. 432; s. c. 8 Reporter, 801; 20 Alb. L. J. 409; *post*, p. 502.

Jurisdiction in Certain Cases.

times arisen under this act. Sect. 3 of the act¹ limits the liability of ship-owners to the value of the ship and freight then pending. Sect. 4 of the act² provides the mode to be adopted by the owner, in case the injury is to several, and the value of the ship and freight then pending is insufficient to compensate all in full, to stay actions at common law in the State courts. In such cases the remedy cannot be afforded by a court of common law, which has not the methods or the machinery whereby the act can be administered.³ But no objection can be taken to the jurisdiction of a common-law court where the injury is sustained by a single party, and the amount of damage is less than the value of the ship and pending freight.⁴

Other cases, illustrative of the construction to be put upon the sections of the act referring to collisions, and therefore not properly within the scope of this note, will be added without extended notice.⁵

¹ Rev. Stats., § 4233, *supra*, p. 433, note.

² Rev. Stats., §§ 4234, 4235, *supra*, p. 433, n.

³ *Chisholm v. Northern Transp. Co.*, 61 Barb. 363.

⁴ *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1.

⁵ *Thorp v. Hammond*, 12 Wall. 409; *Norwich Co. v. Wright*, 13 Wall. 104; *The City of Hartford and The Unit*, 11 Blatchf. 290; *Place v. The City of Norwich*, 1 Ben. 89; *Allen v. Mackay*, 1 Sprague, 219.

CHAPTER XVI.

LIABILITY OF CARRIER IN RESPECT OF PASSENGER'S BAGGAGE.

- LEADING CASES: 1. *Hollister v. Nowlen*. — Carriers of passengers are responsible as common carriers for the baggage of passengers — Power to limit this common-law liability by notice or contract — Regulations as to carriage of baggage.
2. *New York Central and Hudson River Railroad Company v. Fraloff*. — The same subject — What is baggage — Value of baggage — Fraud of passenger.

- NOTES: § 1. What is baggage — A mixed question of law and fact.
2. Articles which cannot be considered as baggage.
3. Articles which are comprehended under the term "baggage."
4. Custody of the baggage — "Booking" and "checking."
5. Baggage under the personal control of the passenger — Theft of.
6. Articles received in other capacity than as a carrier.
7. A question of *respondeat superior*.
8. The contract in respect of the carriage of baggage — A carrier of passengers is responsible as a common carrier for the safe carriage of baggage.
9. Responsibility for extra baggage.
10. Baggage of gratuitous passenger.
11. Lien upon baggage for fare.
12. Carriers of baggage only.
13. Liability of carrier for loss of baggage, how limited by contract.
14. Liability of carrier for loss of baggage, how limited by notice — English Railway and Canal Traffic Act.
15. What will constitute notice.
16. An exception under the Railway and Canal Traffic Act — Excursion trains.
17. Regulations of the carrier in respect of baggage — Notice to passenger.
18. Liability of the carrier limited by statute.
19. Duties of the passenger in respect of baggage during transit.
20. Liability of sleeping-car companies for loss of baggage and valuables.

Hollister v. Nowlen.

- NOTES: § 21. Duty of the carrier to deliver baggage safely.
 22. Duty of carrier to afford facilities for delivery and storage of baggage at destination.
 23. Duty of the passenger to remove his baggage on arrival at destination.
 24. Delivery of baggage upon forged order.
 25. Measure of damages in action for loss of baggage.
 26. Procedure — Parties to action.
 27. Pleading — Form of action.
 28. Competency of plaintiff to show the contents of baggage.
 29. Burden of proof.
 30. *Res gestæ*.

1. CARRIERS OF PASSENGERS RESPONSIBLE AS COMMON CARRIERS FOR THE BAGGAGE OF PASSENGERS—POWER TO LIMIT COMMON-LAW LIABILITY BY NOTICE OR CONTRACT—REGULATIONS AS TO CARRIAGE OF BAGGAGE.

HOLLISTER v. NOWLEN.*

Supreme Court of Judicature of New York, 1838.

HON. SAMUEL NELSON, *Chief Justice*.

“ GREENE C. BRONSON, } *Judges*.
 “ ESEK COWEN, }

1. **Liabilities of Carriers of Passengers in respect of Passenger's Baggage.**—Stage-coach proprietors and other carriers by land and water are answerable as common carriers for the baggage of passengers. They are regarded as insurers thereof, and must answer for any loss not occasioned by the act of God or the public enemies.
2. **Common-Law Liability, how restricted.**—If a carrier can restrict his common-law liability, it can only be by an express contract. Such a contract cannot be implied or inferred from a general notice, though brought home to the knowledge of the owner of the property. Stage-coach proprietors and other common carriers cannot restrict their common-law liability by a general notice that the “baggage of passengers is at the risk of the owners.”
3. **Carrier may demand Statement of Value of Baggage, and Premium in proportion thereto.**—A common carrier, like other insurers, may demand a premium proportioned to the hazards of his employment; he may, therefore, require the owners of goods to give such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care necessary to the discharge of the trust. If the owner gives an answer false in any material point, the carrier will be absolved from the consequences of a loss not occasioned by negligence or misconduct, but in such a case actual notice of the requirements of the carrier must be brought home to the knowledge of the owner of the goods.

THIS was an action against the defendant as a *common carrier* for the loss of the plaintiff's trunk and contents. A case was agreed on be-

* Reported, 19 Wend. 234.

Hollister v. Nowlen.

tween the parties, stating the following facts: The defendant was a member of a company the proprietors of three daily lines of stage-coaches running between Canandaigua and Buffalo, one of which was called the Telegraph Line. The defendant resided at Avon, and with his teams and coaches ran that part of the route lying between Avon and Le Roy. East of Canandaigua the line was owned by other proprietors. The plaintiff resided at Utica, and at that place entered as a passenger in the Telegraph Line for Buffalo. His baggage consisted of a trunk, containing clothing to the value of \$116.75. The fare was duly paid. On July 20, 1833, before daylight in the morning, the plaintiff left Avon in the defendant's coach on his way to Buffalo. The trunk was placed in the boot behind the coach, which was carefully secured by strong leather covering, fastened with strong leather straps and buckles, and was made secure against any loss except by violence. After proceeding about three miles, it was discovered that the straps confining the cover to the boot had been cut, and the plaintiff's trunk with its contents had been feloniously stolen and carried off. There was no negligence on the part of the defendant or his servants in relation to the trunk, further than may be implied from the facts above stated. The plaintiff left the stage, went back to Avon and reported his loss; and the defendant offered a reward, and made all proper efforts for the recovery of the property, but without success.

The Telegraph Line was established in 1828. A public notice that *baggage sent or carried in the Telegraph Line would be at the risk of the owner thereof*, printed on a large sheet, had been uniformly kept placarded in most of the stage-offices and public-houses from Albany to Buffalo; and particularly such notice had been continually affixed up in the stage-office and principal public-houses at Utica, where the plaintiff had resided for the last three years before the trunk was lost. It was stipulated that should the court be of opinion that the plaintiff was entitled to recover, judgment should be entered in his favor for \$116.75, and interest from July 20, 1833, besides costs.

This cause was twice argued, the first time in July term, 1835, by *C. P. Kirkland*, for the plaintiff, and by *M. T. Reynolds*, for the defendant; and the second time in July term, 1837, by *C. P. Kirkland*, for the plaintiff, and by *P. Gridley*, for the defendant. At this term the following opinion was delivered:—

By the Court, BRONSON, J. — Stage-coach proprietors and other carriers by land and water incur a very different responsibility in relation to the passenger and his baggage. For an injury to the passenger they are answerable only where there has been a want of proper care, dili-

 Supreme Court of Judicature of New York.

gence, or skill; but in relation to baggage they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or the public enemies. As the point, though made, was not discussed by the defendant's counsel, I shall content myself with referring to a few cases to prove that they are liable as common carriers for the loss or injury of the property of the passenger.¹ The fact that the owner is present, or sends his servant to look after the property, does not alter the case.² CHAMBRE, J., said: "It has been determined that if a man travel in a stage-coach and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost." The liability of a carrier is like that of an innkeeper; and it was said in *Calye's Case*,³ that "it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he lodged, and that he left the door open, but he ought to keep the goods and chattels of his guests there in safety." When there is no fraud, the fact that the owner accompanies the property cannot affect the principle on which the carrier is charged in case of loss.

The principal question in the cause arises out of the notice given by the coach proprietors that *baggage carried by the Telegraph Line would be at the risk of the owner*; and the first inquiry is whether there was sufficient evidence to charge the plaintiff with a knowledge of the notice. If we are to follow the current of modern English decisions on this subject, it cannot be denied that there was evidence to be left to a jury, and upon which they might find that the plaintiff had seen the notice. But I think the carrier, if he can by any means restrict his liability, can only do so by proving *actual notice* to the owner of the property. I agree to the rule laid down by BEST, C. J., in *Brooke v. Pickwick*,⁴ decided in 1827, when the courts of Westminster Hall had commenced retracing their steps in relation to the liability of carriers, and were endeavoring to get back on to the firm foundation of the common law. He said: "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and at the same time to place in his hands a printed paper specifying the precise extent of their engagement. If they omit to do this, they attract customers under the confidence inspired by the extensive liability which the common law imposes upon carriers, and then endeavor

¹ *Orange County Bank v. Brown*, 9 Wend. 85; *Camden etc. R. Co. v. Burke*, 13 Wend. 611; *Brooke v. Pickwick*, 4 Bing. 218; *Clark v. Gray*, 4 Esp. 177; 2 Kent's Comm. 601.

² *Robinson v. Dunmore*, 2 Bos. & Pul. 418.

³ 8 Co. 63.

⁴ 4 Bing. 218.

Hollister v. Nowlen.

to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them."

I should be content to place my opinion upon the single ground that if a notice can be of any avail, it must be directly brought home to the owner of the property, and that there was no evidence in this case which could properly be submitted to a jury to draw the inference that the plaintiff knew on what terms the coach proprietor intended to transact his business. But other questions have been discussed, and there is another case before the court where the judge at the circuit thought the evidence sufficient to charge the plaintiff with notice. It will therefore be proper to consider the other questions which have been made by the counsel.

Can a common carrier restrict his liability by a general notice, in any form, brought home to the opposite party? Without intending to go much at large into this vexed question, it will be necessary to state some leading principles relating to the duties and liabilities of the carrier, and the ground upon which his responsibility rests.

The rules of the common law in relation to common carriers are simple, well-defined, and, what is no less important, well understood. The carrier is liable for all losses except those occasioned by the act of God or the public enemies. He is regarded as an insurer of the property committed to his charge, and neither destruction by fire nor robbery by armed men will discharge him from liability. *HOLT. C. J.*, in pronouncing his celebrated judgment in the case of *Coggs v. Bernard*,¹ said: "This is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing." In *Forward v. Pittard*,² where the carrier was held liable for a loss by fire, Lord MANSFIELD said, that, "to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, — as storms, lightnings, and tempests." And in relation to a loss by robbery he said: "The true reason is for fear it may give room for collusion, — that the master may contrive to be robbed on purpose, and share the spoil." The rule has been fully recognized in this State.³ In *Roberts v. Turner*,⁴ SPENCER, J., said: "The carrier is held responsible as an insurer of the goods, to prevent combinations, chicanery, and fraud."

¹ 2 Ld. Raym. 918.² 1 Term Rep. 27.*v. Rossell*, 10 Johns. 1; *Kemp v. Coughtry*,³ *Colt v. McMechen*, 6 Johns. 160; *Elliot*

11 Johns. 107.

⁴ 12 Johns. 232.

 Supreme Court of Judicature of New York.

A common carrier exercises a public employment, and consequently has public duties to perform. He cannot, like the tradesman or mechanic, receive or reject a customer at pleasure, or charge any price that he chooses to demand. If he refuse to receive a passenger or carry goods according to the course of his particular employment, without a sufficient excuse, he will be liable to an action; and he can only demand a reasonable compensation for his services and the hazard which he incurs.¹

It has been said that the carrier is liable in respect of his reward.² Lord COKE says: "He hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him."³ The carrier may, no doubt, demand a reward proportioned to the service he renders and the risk he incurs; and, having taken it, he is treated as an insurer, and bound to the safe delivery of the property. But the extent of his liability does not depend on the terms of his contract; it is declared by law. His undertaking, when reduced to form, does not differ from that of any other person who may agree to carry goods from one place to another; and yet, one who does not usually exercise this public employment will incur no responsibility beyond that of an ordinary bailee for hire; he is not answerable for a loss by any means against which he could not have guarded by ordinary diligence. It is not the form of the contract, but the policy of the law, which determines the extent of the carrier's liability. In *Ansell v. Waterhouse*,⁴ which was an action on the case against the proprietor of a stage-coach for an injury to the plaintiff's wife, HOLROYD, J., said: "This action is founded on what is quite collateral to the contract, if any; and the terms of the contract, unless changing the duty of a common carrier, are in this case quite immaterial. The declaration states an obligation imposed upon him by the law. This is an action against a person who, by an ancient law, held as it were a public office, and was bound to the public. This action is founded on the general obligation of the law." In *Forward v. Pittard*,⁵ Lord MANSFIELD said: "It appears from all the cases for a hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the cus-

¹ *Coggs v. Bernard*, 2 Ld. Raym. 917; Bac. Abr., tit. "Carriers," B; *Boulston v. Sandiford*, Skin. 279; *Gisbourn v. Hurst*, 1 Salk. 249, 250; *Riley v. Horne*, 5 Bing. 217; *Harris v. Packwood*, 3 Taun. 272, per Lawrence, J.; 2

Kent's Comm. 599; *Story on Bail.* 328; *Jeremy on Car.* 59.

² *Lane v. Cotton*, 1 Salk. 143.

³ *Co. Lit.* 89 a.

⁴ 2 Chit. 1.

⁵ 1 Term Rep. 27.

Hollister v. Nowlen.

tom of the realm,—that is, by the common law; a carrier is in the nature of an insurer.”¹

The law in relation to carriers has in some instances operated with severity, and they have been charged with losses against which no degree of diligence could guard. But cases of this description are comparatively of rare occurrence; and the reason why they are included in the rule of the common law is not because it is fit in itself that any man should answer without a fault, but because there are no means of effectually guarding the public against imposition and fraud, without making the rule so broad that it will sometimes operate harshly. It was well remarked by BEST, C. J., in *Riley v. Horne*,² that “when goods are delivered to the carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to their place of destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier’s servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves.” These remarks lose little of their force when applied to the case of passengers in stages, steamboats, and railroad cars; for, although they are in the neighborhood of their property, it is neither under their eye, nor have they any efficient means of protecting it against the consequences of negligence and fraud. The traveller is usually among strangers. His property is in the hands of men who are sometimes selected with little regard to their diligence and fidelity; and if the remedy of the owner, in case of loss, depend on the question of actual negligence or fraud, he must make out his right to recover by calling the very men whose recklessness or frailty has occasioned the injury. It was remarked by BEST, C. J., in *Brooke v. Pickwick*,³ that, “though coach proprietors of the present day are a respectable and opulent class, many of the persons employed by them resemble those whom the common law meant to guard against.”

There is less of hardship in the case of the carrier than has sometimes been supposed; for while the law holds him to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. The rule is founded upon a great principle of public policy; it has been approved by many generations

¹ See also *Hide v. Proprietors, etc.*, 1 Esp. 36.

² 5 Bing. 217.

³ 4 Bing. 218.

 Supreme Court of Judicature of New York.

of wise men; and if the courts were now at liberty to make instead of declaring the law, it may well be questioned whether they could devise a system which, on the whole, would operate more beneficially. I feel the more confident in this remark from the fact that in Great Britain, after the courts had been perplexed for thirty years with various modifications of the law in relation to carriers, and when they had wandered too far to retrace their steps, the legislature finally interfered, and in all its most important features restored the salutary rule of the common law.

The doctrine that a carrier might limit his responsibility by a general notice brought home to the employer prevailed in England for only a short period. In *Smith v. Horne*,¹ BURROUGH, J., said: "The doctrine of notice was never known until the case of *Forward v. Pittard*,² which I argued many years ago." That case was decided in 1785, and it is remarkable that it does not contain one word on the subject of notice. If that question was in any form before the court, it is not mentioned by the reporter; and the decision was against the carrier, although the loss was occasioned by fire, without his default. The doctrine was first recognized in Westminster Hall in 1804, where the case of *Nicholson v. Willan*³ was decided. Lord ELLENBOROUGH said the practice of making a "special acceptance" had prevailed for a long time, and that there was "no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility, has ever been by express decision denied." Whatever may be the rule where there is in fact a special contract, the learned judge could not have intended to say that a carrier had for a long time been allowed to limit his liability by a general notice, or that a special contract had been implied from such a notice; for he refers to no case in support of the position, and would have searched in vain to find one. Only eleven years before (in 1793), Lord KENYON had expressly laid down a different rule in *Hide v. Proprietors, etc.*⁴ He said: "There is a difference where a man is chargeable *by law* generally, and where on his *contract*. Where a man is bound to any duty, and chargeable to a certain extent by the operation of law, in such case he cannot, by any act of his own, discharge himself." And he put the case of common carriers, and said they cannot discharge themselves "by any act of their own, — as by giving notice, for example, to that effect." This case was afterwards before the King's Bench, but on another point.⁵

The doctrine in question was not received in Westminster Hall with-

¹ 8 Taun. 144.² 1 Term Rep. 27.³ 5 East, 507.⁴ 1 Esp. 36.⁵ 5 Term Rep. 389

Hollister v. Nowlen.

out much doubt; and although it ultimately obtained something like a firm footing, many of the English judges have expressed their regret that it was ever sanctioned by the courts. Departing as it did from the simplicity and certainty of the common-law rule, it proved one of the most fruitful sources of legal controversy which has existed in modern times. When it was once settled that a carrier might restrict his liability by a notice brought home to his employer, a multitude of questions sprung up in the courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment, and the legal effect of each particular form of notice could only be settled by judicial decision. Whether one who had given notice that he would not be answerable for goods beyond a certain value unless specially entered and paid for was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether, notwithstanding the notice, he was liable for a loss by negligence, and, if so, what degree of negligence would charge him; what should be sufficient evidence that the notice came to the knowledge of the employer; whether it should be left to the jury to presume that he saw it in a newspaper which he was accustomed to read, or observed it posted up in the office where the carrier transacted his business; and then, whether it was painted in large or small letters, and whether the owner went himself or sent his servant with the goods, and whether the servant could read, — these and many other questions were debated in the courts, while the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law.¹ After years of litigation, Parliament interfered in 1830, and relieved both the courts and the public by substantially reasserting the rule of the common law.²

Without going into a particular examination of the English cases, it is sufficient to say that the question has generally been presented on a notice by the carrier that he would not be responsible for any loss beyond a certain sum unless the goods were specially entered and paid for; and the decisions have for the most part only gone far enough to say that if the owner do not comply with the notice, by stating the true value of the goods and having them properly entered, the carrier will be discharged. In these cases the carrier had not attempted to exclude all responsibility. But there are two *nisi prius* decisions which allow the carrier to cast off all liability whatever. In *Maving v.*

¹ See 1 Bell's Comm. 474.

² Stat. 1 Wm. IV., c. 63.

Supreme Court of Judicature of New York.

Todd,¹ the defendant had given notice that he would not answer for a loss by fire; and such a loss having occurred, Lord ELLENBOROUGH thought that carriers might exclude their liability altogether, and nonsuited the plaintiff. In *Leeson v. Holt*,² tried in 1816, he made a like decision; though he very justly remarked that "if this action had been brought twenty years ago, the defendant would have been liable; since by the common law a carrier is liable in all cases except two." We have here, what will be found in many of the cases, a very distinct admission that the courts had departed from the law of the land, and allowed what *Jeremy's Treatise on Carriers*³ very properly terms "recent innovations."

Some of the cases which have arisen under a general notice have proceeded on the ground of fraud,⁴ others on notion of a special acceptance or special contract,⁵ while in some instances it is difficult to say what general principle the court intended to establish.

So far as the cases have proceeded on the ground of fraud, and can properly be referred to that head, they rest on a solid foundation; for the common law abhors fraud, and will not fail to overthrow it in all the forms, whether new or old, in which it may be manifested. As the carrier incurs a heavy responsibility, he has a right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust; and if the owner give an answer which is false in a material point, the carrier will be absolved from the consequences of any loss not occasioned by negligence or misconduct. The case of *Kenrig v. Eggleston*⁶ was decided in 1649. The plaintiff delivered a box to the porter of the carrier, saying "there was a book and tobacco in the box," when in truth it contained £100 in money besides. ROLL, J., thought the carrier was nevertheless liable for a loss by robbery. "But in respect of the intended cheat to the carrier, he told the jury they might consider him in damages." The jury, however, found the whole sum (abating the carriage) for the plaintiff, *quod durum videbatur circumstantibus*. In *Gibbon v. Paynton*,⁷ Lord MANSFIELD said this was a case of fraud, and he "should have agreed in opinion with the *circumstantibus*." In *Tyly v. Morrice*,⁸ two bags of money, sealed up, were delivered to the carrier [the servant of the plaintiff], saying they contained £200, and he gave a receipt for the money. In truth, the bags contained £450; and the carrier,

¹ 1 Stark. 72.² 1 Stark. 186.⁵ *Nicholson v. Willan*, 5 East, 507; *Harris v. Packwood*, 3 Taun. 271.⁶ *Aleyn*, 93.³ Pp. 35, 36.⁴ *Batson v. Donovan*, 4 Barn. & Ald. 21.⁷ 4 Burr. 2298.⁸ *Carth.* 485.

Hollister v. Nowlen.

having been robbed, paid the £200: and in this action, brought to recover the balance, the CHIEF JUSTICE told the jury that. "since the plaintiffs had taken this course to defraud the carrier of his reward, they should find for the defendant." And the same point was decided in another action against the same carrier. In *Gibbon v. Paynton*,¹ £100 in money was hid in hay in an old mail-bag, which fact the plaintiff concealed from the carrier; and the money having been stolen, the court held that this fraud would discharge the defendant. In the case of *Orange County Bank v. Brown*,² the agent of the plaintiffs put \$11,000 in bank-bills in his trunk, and delivered it to the captain of the steamboat as his baggage. The court held that the term "baggage" would only include money for the expenses of travelling, and not a large sum, as in this case, taken for the mere purpose of transportation; and it was said that the conduct of the plaintiffs' agent was a virtual concealment as to the money, — that "his representation of his trunk and the contents as baggage was not a fair one, and was calculated to deceive the captain." The owner is not bound to disclose the nature or value of the goods; but if he is inquired of by the carrier, he must answer truly.³

Fraud cannot, I think, be imputed to the owner from the mere fact that he delivers goods after having seen a general notice published by the carrier, whatever may be its purport. If the carrier wishes to ascertain the extent of his risk, he should inquire at the time the goods are delivered; and then, if he is not answered truly, he will have a defence.⁴ A different rule practically changes the burden of proof. At the common law, it is enough that the owner prove the undertaking of the carrier, and that the goods did not reach their destination. But this doctrine of implying fraud from a notice requires him to go further, and show that he complied with the terms of the advertisement. He may have informed the carrier truly of the value of the goods,—there may be no fraud, but still he is required to prove himself innocent before he can recover. Independent of a notice, the *onus* would rest where, upon general principles, it ought to rest, — on him who imputes fraud; and the carrier could not discharge himself without showing some actual misrepresentation or fraudulent concealment. It does not lie on the employer to show how the loss was occasioned, or that he has acted properly; but the law presumes against the carrier, until he proves that the loss happened by means or under circumstances for which he is not answerable.⁵

¹ 4 Burr. 2298.² 9 Wend. 85.³ Phillips v. Earle, 8 Pick. 182.⁴ See Brooke v. Pickwick, 4 Bing. 218.⁵ Forward v. Pittard, 1 Term Rep. 33; Murphy v. Staton, 3 Munf. 239; Story on Bail. 338.

 Supreme Court of Judicature of New York.

But it is enough for this case that the question of fraud can never arise under such a notice as was given by the defendant. He did not say to the public that he would not be answerable for baggage beyond a certain sum unless the owner disclosed the value; he said he would not be answerable in any event. It was, in effect, a notice that he would not abide the liabilities which the law, upon principles of public policy, had attached to his employment. If the notice can aid the defendant in any form, it certainly does not go to the question of fraud.

The only remaining ground of argument in favor of the carrier is that a special contract may be inferred from the notice. Independent of the modern English cases, it seems never to have been directly adjudged that the liability of the carrier can be restricted by a special contract. Noy,¹ after speaking of a loss by negligence, says: "If a carrier would refuse to carry unless a promise were made to him that he should not be charged with any such miscarriage, that promise were void." If he cannot stipulate for a partial, it is difficult to see how he can for a total exemption from liability. In *Nicholson v. Willan*,² Lord ELLENBOROUGH found no direct adjudication in favor of the position that a carrier may limit his responsibility by a special contract; but he relied on the fact that such an exemption had never been "by express decision denied." Although this mode of reasoning is not the most conclusive, I shall not deny that the carrier may by express contract restrict his liability; for though the point has never been expressly adjudged, it has often been assumed as good law.³ If the doctrine be well founded, it must, I think, proceed on the ground that the person intrusted with the goods, although he usually exercises that employment, does not in the particular case act as a common carrier. The parties agree that in relation to that transaction he shall throw off his public character, and, like other bailees for hire, only be answerable for negligence or misconduct. If he act as a carrier, it is difficult to understand how he can make a valid contract to be discharged from a duty or liability imposed upon him by law.

But, conceding that there may be a special contract for a restricted liability, such a contract cannot, I think, be inferred from a general notice brought home to the employer. The argument is, that where a party delivers goods to be carried, after seeing a notice that the carrier

¹ Maxims, 92.

² 5 East, 513.

³ Kenrig v. Eggleston, Aleyn, 93; 4 Co. 84; note to Southcote's Case, 4 Burr. 2301, per

Yates, J.; Morse v. Slue, 1 Vent. 190, 233; Catley v. Wintringham, Peak. 150; Harris v. Packwood, 3 Taun. 271; Leeson v. Holt, 1 Stark. 186.

Hollister v. Nowlen.

intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than \$100, the assent of the customer to pay that sum, although it be double the value, may perhaps be implied; but if the mechanic had been under legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now, the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can, at the most, only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice, cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities.

Making a notice the foundation for presuming a special contract is subject to a further objection. It changes the burden of proof. Independent of the notice, it would be sufficient for the owner to prove the delivery and loss of the goods, and it would then lie on the carrier to discharge himself by showing a special contract for a restricted liability; but giving effect to the notice makes it necessary for the owner to go beyond the delivery and loss of the goods, and prove that he did not assent to the proposal for a limited responsibility. Instead of leaving the *onus* of showing assent on him who sets up that affirmative fact, it is thrown upon the other party, and he is required to prove a negative, — that he did not assent.

After all that has been or can be said in defence of these notices, whether regarded either as a ground for presuming fraud or implying a special agreement, it is impossible to disguise the fact that they are a mere contrivance to avoid the liability which the law has attached to the employment of the carrier. If the law is too rigid, it should be modified by the legislature, and not by the courts. It has been admitted

Supreme Court of Judicature of New York.

over and over again by the most eminent English judges that the effect given to these notices was a departure from the common law, and they have often regretted their inability to get back again to that firm foundation. The doctrine that a carrier may limit his responsibility by a notice was wholly unknown to the common law at the time of our Revolution. It has never been received in this, nor, so far as I have observed, in any of the other States. The point has been raised, but not directly decided.¹ Should it now be received among us, it will be after it has been tried, condemned, and abandoned in that country to which we have been accustomed to look for light on questions of jurisprudence.

The act of Parliament already mentioned enumerates various articles of great value in proportion to the bulk, and others which are peculiarly exposed to damage in transportation, and declares that the carrier shall not be liable for the loss or injury of those articles, when the value exceeds £10, unless at the time of delivery the owner shall declare the nature and value of the property, and pay the increased charge which the carrier is allowed to make for his risk and care. If the owner complies with this requirement, the carrier must give him a receipt for the goods, "acknowledging the same to have been insured," and if he refuse to give the receipt, he remains "liable and responsible as at the common law." The provision extends to the proprietors of stage-coaches as well as all other carriers, and to property which may "accompany the person of any passenger," as well as other goods; and the statute declares that after the first day of September, 1830, "no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law" of any carriers, but that all and every such carrier shall be "liable as at the common law to answer" for the loss or injury of the property, "any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding." The only modification of the common-law rule in relation to carriers made by this statute is that which requires the owner, without a special request, to disclose the nature and value of the package when it contains articles of a particular description. The premium for care and risk, the carrier might have required before. In relation to all articles not enumerated, and in relation to those also, if the owner comply with the requirements of the act, the carrier is declared liable as an insurer, and must answer "as at the common law." The whole doctrine which had sprung up under notices is cut up by the

¹ *Barney v. Prentiss*, 4 Har. & J. 317; *Dwight v. Brewster*, 1 Pick. 50.

New York Central and Hudson River Railroad Company *v.* Fraloff.

roots, and in such language as renders it apparent that the legislature deemed it an innovation on the law of the land.

If after a trial of thirty years the people of Great Britain, whose interests and pursuits are not very dissimilar to our own, have condemned the whole doctrine of limiting the carrier's liability by a notice; if after a long course of legal controversy they have retraced their steps, and returned to the simplicity and certainty of the common-law rule; we surely ought to profit by their experience, and should hesitate long before we sanction a practice which not only leads to doubt and uncertainty concerning the rights and duties of the parties, but which encourages negligence and opens a wide door to fraud.

If the policy of the law in relation to carriers were more questionable than I think it is, it would be the business of the legislature, and not of the courts, to apply the proper remedy. The plaintiff is entitled to judgment in pursuance of the stipulation contained in the case.

The CHIEF JUSTICE concurred.

COWEN, J., concurred in the result, for the reasons assigned by him in the case of *Cole v. Goodwin*.¹

Judgment for the plaintiff.

2. THE SAME SUBJECT—WHAT IS "BAGGAGE"—VALUE OF BAGGAGE—FRAUD OF PASSENGER.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY
v. FRALOFF.*

Supreme Court of the United States, October Term, 1879.

Hon. MORRISON R. WAITE, *Chief Justice.*

" NATHAN CLIFFORD, " SAMUEL F. MILLER, " WILLIAM STRONG, " WARD HUNT, " NOAH H. SWAYNE, " STEPHEN J. FIELD, " JOSEPH P. BRADLEY, " JOHN M. HARLAN,	}	<i>Justices.</i>
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1. *Regulations as to Baggage of Passengers.*—It is competent for a passenger-carrier, by specific regulations, distinctly brought to the knowledge of the passenger, which are

* Reported, 9 Cent. L. J. 432; s. c. 8 Reporter, 801; 20 Alb. L. J. 409.

Supreme Court of the United States.

reasonable, and not inconsistent with any statute or its duties to the public, to protect itself against liability, as insurer, for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk.

2. **Extra Compensation.**—As a condition precedent to any contract for the transportation of baggage, the carrier may require information from the passenger as to its value, and demand extra compensation for any excess beyond that which the passenger may reasonably demand to be transported as baggage under the contract to carry the person.
3. **Value of Baggage—Fraud of Passenger.**—The carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by any device or artifice, puts off inquiry as to such value, whereby responsibility is imposed upon the carrier beyond what it is bound to assume in consideration of the ordinary fare charged for the transportation of the person.
4. **Voluntary Disclosure of Value of Baggage not required.**—In absence of legislation, or special regulations by the carrier, or of conduct by the passenger misleading the carrier as to value of baggage, the failure of the passenger, unasked, to disclose the value of his baggage is not, in itself, a fraud upon the carrier.
5. **What is "Baggage."**—To the extent that articles carried by a passenger for his personal use when travelling exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer.
6. **Excess of Baggage—Law and Fact.**—Whether a passenger has carried such an excess of baggage is not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance as to the law of the case, and its determination of the facts—no error of law appearing—is not subject to reexamination in this court.
7. **Section 4281 of the Revised Statutes** of the United States has no reference to the liability of carriers by land for the baggage of passengers.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

Mr. Justice HARLAN delivered the opinion of the court. — This is a writ of error to a judgment rendered against the New York Central and Hudson River Railroad Company, in an action to recover the value of certain articles of wearing apparel alleged to have been taken from the trunk of the defendant in error while a passenger upon the cars of the company, and while the trunk was in its charge for transportation as part of her baggage. There was evidence before the jury tending to establish the following facts: The defendant in error, a subject of the czar of Russia, possessing large wealth, and enjoying high social position among her own people, after travelling in Europe, Asia, and Africa, spending some time in London and Paris, visited America, in the year 1869, for the double purpose of benefiting her health and seeing this country. She brought with her to the United States six trunks of ordinary, travel-worn appearance, containing a large quantity of wearing apparel, including many elegant, costly dresses, and also rare and valuable laces which she had been accustomed to wear upon different dresses when on visits, or frequenting theatres, or attending din-

New York Central and Hudson River Railroad Company *v.* Fraloff.

ners, balls, or receptions. A portion of the laces was made by her ancestors upon their estates in Russia. After remaining some weeks in the city of New York, she started upon a journey westward, going first to Albany, and taking with her, among other things, two of the trunks brought to this country. Her ultimate purpose was to visit a warmer climate, and upon reaching Chicago, to determine whether to visit California, New Orleans, Havana, and probably Rio Janeiro. After passing a day or so at Albany, she took passage on the cars of the New York Central and Hudson River Railroad Company for Niagara Falls, delivering to the authorized agents of the company for transportation as her baggage the two trunks above described, which contained the larger portion of the dress-laces brought with her from Europe. Upon arriving at Niagara Falls she ascertained that one of the trunks, during transportation from Albany to the Falls, had been materially injured, its locks broken, its contents disturbed, and more than two hundred yards of dress-lace abstracted from the trunk, in which it had been carefully placed before she left the city of New York. The company declined to pay the sum demanded as the value of the missing laces; and having denied all liability therefor, this action was instituted to recover the damages which the defendant in error claimed to have sustained by reason of the loss of her property.

Upon the first trial of the case, in 1873,¹ the jury, being unable to agree, were discharged. A second trial took place in the year 1875. Upon the conclusion of the evidence in chief at the last trial, the company moved a dismissal of the action, and at the same time submitted numerous instructions which it asked to be then given to the jury, among which was one peremptorily directing a verdict in its favor. The motion was overruled, and the court declined to instruct the jury as requested. Subsequently, upon the conclusion of the evidence upon both sides, the motion for a peremptory instruction in behalf of the company was renewed, and again overruled. The court thereupon gave its charge; to which the company filed numerous exceptions, and also submitted written requests, forty-two in number, for instruction to the jury. The court refused to instruct the jury as asked, or otherwise than as shown in its own charge. To the action of the court in the several respects indicated, the company excepted in due form. The jury returned a verdict against the company for the sum of \$10,000, although the evidence, in some of its aspects, placed the value of the missing laces very far in excess of that amount.

¹ [Probably 1872. See *Fraloff v. New York etc. R. Co.*, 10 Blatch. 16.]

Supreme Court of the United States.

It would extend this opinion to an improper length, and could serve no useful purpose, were we to enter upon a discussion of the various exceptions, unusual in their number, to the action of the court in the admission and exclusion of evidence, as well as in refusing to charge the jury as requested by the company. Certain controlling propositions are presented for our consideration, and upon their determination the substantial rights of parties seem to depend. If, in respect of these propositions, no error was committed, the judgment should be affirmed, without any reference to points of a minor and merely technical nature, which do not involve the merits of the case or the just rights of parties.

In behalf of the company it is earnestly claimed that the court erred in not giving a peremptory instruction for a verdict in its behalf. This position, however, is wholly untenable. Had there been no serious controversy about the facts, and had the law upon the undisputed evidence precluded any recovery whatever against the company, such an instruction would have been proper.¹ The court could not have given such an instruction in this case without usurping the functions of the jury. This will, however, more clearly appear from what is said in the course of this opinion.

The main contention of the company, upon the trial below, was that good faith required the defendant in error, when delivering her trunks for transportation, to inform its agents of the peculiar character and extraordinary value of the laces in question; and that her failure in that respect, whether intentional or not, was in itself a fraud upon the carrier, which prevented any recovery in this action.

The Circuit Court refused — and, in our opinion, rightly — to so instruct the jury. We are not referred to any legislative enactment restricting or limiting the responsibility of passenger-carriers by land for articles carried as baggage; nor is it pretended that the plaintiff in error had, at the date of these transactions, established or promulgated any regulation as to the quantity or value of baggage which passengers upon its cars might carry, without extra compensation, under the general contract to carry the person. Further, it is not claimed that any inquiry was made of the defendant in error, either when the trunks were taken into the custody of the carrier, or at any time prior to the alleged loss, as to the quantity or value of their contents. It is undoubtedly competent for a carrier of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character, and not inconsistent with any statute or its duties to the public,

¹ *Schechardt v. Allens*, 1 Wall. 369; *Parks v. Ross*, 11 How. 372; *Richardson v. Boston*, 19 How. 269; *Pleasants v. Fant*, 22 Wall. 121.

New York Central and Hudson River Railroad Company v. Fraloff.

to protect itself against liability, as insurer, for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and consequently of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies. It is also undoubtedly true that the carrier may be discharged from liability for the full value of the passenger's baggage if the latter, by false statements, or by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it was bound to assume in consideration of the ordinary fare charged for the transportation of the person. But in the absence of legislation limiting the responsibility of carriers for the baggage of passengers; in the absence of reasonable regulations upon the subject by the carrier, of which the passenger has knowledge; in the absence of inquiry of the passenger as to the value of the articles carried, under the name of baggage, for his personal use and convenience when travelling; and in the absence of conduct upon the part of the passenger misleading the carrier as to the value of his baggage, the court cannot, as a mere matter of law, declare, as it was in effect requested in this case to do, that the mere failure of the passenger, unasked, to disclose the value of his baggage, is a fraud upon the carrier, which defeats all right of recovery. The instructions asked by the company virtually assumed that the general law governing the rights, duties, and responsibilities of passenger-carriers prescribed a definite, fixed limit of value, beyond which the carrier was not liable for baggage except under a special contract or upon previous notice as to value. We are not, however, referred to any adjudged case or to any elementary treatise which sustains that proposition without qualification. In the very nature of things, no such rule could be established by courts in virtue of any inherent power they possess. The quantity or kind or value of the baggage which a passenger may carry under the contract for the transportation of his person depends upon a variety of circumstances, which do not exist in every case. "That which one traveller," says ERLE, C. J., in *Phelps v. London, etc. Railway Company*,¹ "would

¹ 19 C. B. (N. S.) 321.

 Supreme Court of the United States.

consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind will be taken in the mind of the carrier when he receives a passenger for conveyance." Some of the cases seem to announce the broad doctrine that, by general law, in the absence of legislation, or special regulations by the carrier of the character indicated, a passenger may take, without extra compensation, such articles adapted to personal use as his necessities, comfort, convenience, or even gratification may suggest; and that, whatever may be the quantity or value of such articles, the carrier is responsible for all damages or loss to them from whatever source, unless from the act of God or the public enemy. But that, in our judgment, is not an accurate statement of the law. Whether articles of wearing apparel, in any particular case, constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when travelling. "The implied undertaking," says Mr. Angell, "of the proprietors of stage-coaches, railroads, and steamboats to carry in safety the baggage of passengers is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveller usually carries with him for his personal convenience."¹ In *Hannibal Railroad v. Swift*,² this court, speaking through Mr. Justice FIELD, said that the contract to carry the person "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travellers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a decision of the Queen's Bench in *Macrow v. Great Western Railway Company*,³ where COCKBURN, C. J., announced the true rule to be "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage."⁴ To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer. In cases of abuse by the passenger of the privileges which the law gives him, the carrier secures such exemption from responsibility; not, however, be-

¹ Ang. on Car., § 115.² 12 Wall. 275.³ L. R. 6 Q. B. 612.⁴ 2 Pars. on Con. 199.

New York Central and Hudson River Railroad Company *v.* Fraloff.

cause the passenger, uninquired of, failed to disclose the character and value of the articles carried, but because the articles, being themselves in excess of the amount usually or ordinarily carried under like circumstances, would not constitute baggage within the true meaning of the law. The laces in question confessedly constituted a part of the wearing apparel of the defendant in error. They were adapted to, and exclusively designed for, personal use, according to her convenience, comfort, or taste, during the extended journey upon which she had entered. They were not merchandise; nor is there any evidence that they were intended for sale, or for purposes of business. Whether they were such articles, in quantity and value, as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification, or comfort while travelling, was not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases. It was for the jury to say to what extent, if any, the baggage of defendant in error exceeded in quantity and value that which was usually carried without extra compensation, and to disallow any claim for such excess.

Upon examining the carefully guarded instructions given to the jury, we are unable to see that the court below omitted any thing essential to a clear comprehension of the issues, or announced any principle or doctrine not in harmony with settled law. After submitting to the jury the disputed question as to whether the laces were in fact in the trunk of the defendant in error when delivered to the company in Albany for transportation to Niagara Falls, the court charged the jury, in substance, that every traveller was entitled to provide for the exigencies of his journey in the way of baggage; was not limited to articles which were absolutely essential, but could carry such as were usually carried by persons travelling for their comfort, convenience, and gratification upon such journeys; that the liability of carriers could not be maintained to the extent of making them responsible for such unusual articles as the exceptional fancies, habits, or idiosyncracies of some particular individual may prompt him to carry; that their responsibility as insurers was limited to such articles as it was customary or reasonable for travellers of the same class in general to take for such journeys as the one which was the subject of inquiry, and did not extend to those which the caprice of a particular traveller might lead that traveller to take; that if the company delivered to the defendant in error, aside from the laces in question, baggage which had been carried, and which was sufficient for her as reasonable baggage within the rules laid down,

 Supreme Court of the United States.

she was not entitled to recover; that if she carried the laces in question for the purpose of having them safely kept and stored by railroad companies and hotel-keepers, and not for the purpose of using them as occasion might require for her gratification, comfort, or convenience, the company was not liable; that *if any* portion of the missing articles was reasonable and proper for her to carry, and all was not, they should allow her the value of *that portion*.

Looking at the whole scope and bearing of the charge, and interpreting what was said as it must necessarily have been understood both by the court and jury, we do not perceive that any error was committed to the prejudice of the company, or of which it can complain. No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefor rested with the court below, under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for a new trial. Whether its action in that particular was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a reëxamination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.¹

It is perhaps proper to refer to one other point suggested in the elaborate brief of counsel for the company. Our attention is called to § 4281 of the Revised Statutes, which declares that "if any shipper of platina, gold, gold-dust, * * * coins, jewelry, * * * trinkets, * * * silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be

¹ *Parsons v. Bedford*, 3 Pet. 446; *Barreda v. Silsbee*, 21 How. 167; *Insurance Co. v. Folsom*, 18 Wall. 249.

Notes.

liable for any such goods beyond the value and according to the character thereof, so notified and entered."

It is sufficient to say that that section has no application whatever to this case. It has reference alone to the liability of carriers by water who transport goods and merchandise of the kind designated. It has no reference to carriers by land, and does not assume to declare or restrict their liability for the baggage of passengers.

Mr. Justice FIELD. — I dissent from the judgment of the court in this case. I do not think that two hundred and seventy-five yards of lace, claimed by the owner to be worth \$75,000 and found by the jury to be of the value of \$10,000, can, as a matter of law, be properly considered as baggage of a passenger, for the loss of which the railroad company, in the absence of any special agreement, should be held liable; and I am authorized to state that Mr. Justice MILLER and Mr. Justice STRONG concur in this view.

Judgment affirmed.

NOTES.

§ 1. What is Baggage — A Mixed Question of Law and Fact. — The contract of the carrier, as seen above, is to carry the passenger and his personal baggage. It is evident that in many cases it will become material to determine what articles personal baggage may consist of, and many of the decisions on the subject of passengers' baggage turn upon this question. It is a mixed question of law and fact, to be determined by the jury, under proper instructions from the court.¹ It is of course impossible to give any general rule, which will be equally applicable to all cases, for the determination of what is and what is not properly baggage. This depends to a very great extent upon the circumstances of each individual case, upon the length of the journey, the purpose for which it is made, the position in life and occupation of the traveller, the mode of conveyance, and the character of the country through which he intends to pass. The adjudicated cases on this subject justify the statement that any thing may be carried as personal baggage which travellers usually carry for their *personal* use, comfort, instruction, or amusement, having regard to the circumstances enumerated above.² Thus, while it would be manifestly improper to permit a business man,

¹ Brock v. Gale, 14 Fla. 523; Dibble v. Brown, 12 Ga. 217; Parmalee v. Fisher, 22 Ill. 212; New York etc. R. Co. v. Fraloff, 20 Alb. L. J. 409; s. c. 9 Cent. L. J. 432; 8 Reporter, 801; ante, p. 502.

² Parmalee v. Fischer, 22 Ill. 212; Dibble v. Brown, 12 Ga. 217; American Contract Corp. v. Cross, 8 Bush, 472; Cincinnati etc. R. Co. v. Marcus, 38 Ill. 219; Dexter v. Syra-

cuse etc. R. Co., 42 N. Y. 326; Gleason v. Goodrich Transp. Co., 32 Wis. 85; Del Valle v. Str. Richmond, 27 La. An. 90; Hutchings v. Western etc. R. Co., 25 Ga. 61; Macrow v. Great Western R. Co., L. R. 6 Q. B. 612; s. c. 40 L. J. (C. P.) 300; 24 L. T. (N. S.) 618; 19 Week. Rep. 873; Mississippi etc. R. Co. v. Kennedy, 41 Miss. 671; Toledo etc. R. Co. v. Hammond, 33 Ind. 379; Wilson v. Grand

Articles which are not.

making a short trip upon a railway, to recover for bedding packed with his baggage, yet it was held in the case of a steerage-passenger upon a sea voyage, who was bound to provide his own bedding, that a reasonable amount of such articles properly constituted a part of his baggage, and, if lost, was the subject of recovery.¹

§ 2. Articles which cannot be considered as Baggage. — From the principles above set out, it is obvious that there are some articles which are never to be considered as baggage. It has been decided in a multitude of cases that a passenger cannot carry merchandise in his baggage, to avoid the payment of freight upon it, and recover for its loss against the carrier.² And this rule extends to the samples carried by a travelling salesman while "upon the road."³ Beyond a small amount sufficient for travelling expenses merely, money, whether in bank-notes or specie, is not properly baggage.⁴ And in some instances it has been held that even small amounts for travelling expenses are not properly packed in baggage.⁵ But the weight of authority is to the contrary.⁶ What is a reasonable amount of money for travelling expenses depends upon the length of the journey, the mode of travel, and the position in life of the passenger, and should not exceed what a prudent person would take with him under the circumstances. What such an amount is, is a question for the jury.⁷

Trunk R. Co., 56 Me. 60; Walsh v. Str. H. M. Wright, 1 Newb. Adm. 494; Cadwallader v. Grand Trunk R. Co., 9 Lower Canada Rep. 169; New Orleans etc. R. Co. v. Moore, 40 Miss. 39; Pardee v. Drew, 25 Wend. 459.

¹ Hirschsohn v. Hamburg American Pkt. Co., 2 Jones & Sp. 521.

² Cahill v. London etc. R. Co., 10 C. B. (N. s.) 154; s. c. 7 Jur. (N. s.) 1164; 30 L. J. (C. P.) 289; 9 Week. Rep. 653; 4 L. T. (N. s.) 246 (affirmed on appeal, 13 C. B. (N. s.) 818; 8 Jur. (N. s.) 1063; 31 L. J. (C. P.) 271; 10 Week. Rep. 391); Belfast etc. R. Co. v. Keys, 9 H. L. Cas. 556; s. c. 8 Jur. (N. s.) 367; 9 Week. Rep. 793; 4 L. T. (N. s.) 841; Great Northern R. Co. v. Shepherd, 8 Exch. 30; s. c. 7 Eng. Rail. Cas. 310; 21 L. J. (Exch.) 286; Mississippi etc. R. Co. v. Kennedy, 41 Miss. 671; Collins v. Boston etc. R. Co., 10 Cush. 506; Dibble v. Brown, 12 Ga. 217; Smith v. Boston etc. R. Co., 44 N. H. 325; Bell v. Newton, 4 E. D. Smith, 59; Pardee v. Drew, 25 Wend. 459; Hutchings v. Western etc. R. Co., 25 Ga. 61; Michigan etc. R. Co. v. Oehm, 56 Ill. 293; Michigan etc. R. Co. v. Carrow, 73 Ill. 348; Richards v. Westcott, 2 Bosw. 589; Ross v. Missouri etc. R. Co., 4 Mo. App. 583; Lee v. Grand Trunk R. Co., 36 Upper Canada Q. B. 350; Beckman v. Shouse, 5 R. wle, 179; Blumantle v. Fitchburg R. Co., 20 Alb. L. J. 304.

³ Stimpson v. Connecticut River R. Co., 98 Mass. 83; Hawkins v. Hoffman, 6 Ill. 586; Alling v. Boston etc. R. Co., 126 Mass. 121; s. c. 7 Reporter, 622; 19 Alb. L. J. 292.

⁴ Phelps v. London etc. R. Co., 19 C. B. (N. s.) 321; s. c. 11 Jur. (N. s.) 652; 34 L. J. (C. P.) 259; 13 Week. Rep. 782; 12 L. T. (N. s.) 496; Butcher v. London etc. R. Co., 16 C. B. 13; 1 Jur. (N. s.) 427; 24 L. J. (C. P.) 137; Grant v. Newton, 1 E. D. Smith, 95; Whitmore v. Str. Caroline, 20 Mo. 513; Merrill v. Grinnell, 30 N. Y. 594; Bomar v. Maxwell, 9 Humph. 621; Doyle v. Kiser, 6 Ind. 242; Jordan v. Fall River R. Co., 5 Cush. 69; Dunlap v. International Steamboat Co., 98 Mass. 371; Dibble v. Brown, 12 Ga. 217; Hellman v. Holladay, 1 Woolw. 365; Hutchings v. Western etc. R. Co., 25 Ga. 61; Hickox v. Naugatuck R. Co., 31 Conn. 281; The Ionic, 5 Blatchf. 538; Senecal v. Richelieu Co., 15 Lower Canada Jur. 1; Orange County Bank v. Brown, 9 Wend. 85; Davis v. Michigan etc. R. Co., 22 Ill. 278.

⁵ Grant v. Newton, 1 E. D. Smith, 95; Davis v. Michigan etc. R. Co., 22 Ill. 278.

⁶ Merrill v. Grinnell, 30 N. Y. 594; Bomar v. Maxwell, 9 Humph. 621; Johnson v. Stone, 11 Humph. 419; Doyle v. Kiser, 6 Ind. 242; Jordan v. Fall River R. Co., 5 Cush. 69; Duffy v. Thompson, 4 E. D. Smith, 178; Weed v. Saratoga etc. R. Co., 19 Wend. 534; Cincinnati etc. R. Co. v. Marcus, 38 Ill. 219; Torpey v. Williams, 3 Daly, 162; Hickox v. Naugatuck etc. R. Co., 31 Conn. 281; Illinois etc. R. Co. v. Copeland, 24 Ill. 332; Cadwallader v. Grand Trunk R. Co., 9 Lower Canada Rep. 169; Orange County Bank v. Brown, 9 Wend. 85.

⁷ Merrill v. Grinnell, *supra*; Johnson v.

Notes.

Gold and silver bullion, silver-ware, plate, watches, jewelry, and precious stones, other than what is intended to be worn on the person of the passenger, cannot be considered as baggage.¹ If the articles are such as are usually worn about the person, there seems to be no reason why they may not be properly packed with his baggage while travelling.² The property of another person cannot be carried as a passenger's baggage;³ and this, notwithstanding the other is also a passenger upon the same boat.⁴ But where several members of a family are travelling together, it seems that one of them may carry articles which are the property of the others as his baggage.⁵ Articles intended by the passenger as presents to his friends at the end of his journey are not baggage.⁶ A child's toy-horse is not baggage;⁷ nor are Masonic regalia, nor engravings;⁸ nor are valuable papers, though carried by a lawyer on his way to court, and intended to be used in the trial of a cause there.⁹ Bedding, as seen above, may sometimes be considered baggage,—as in the case of a steerage-passenger bound to provide his own accommodations for sleeping,¹⁰—but ordinarily such articles should be shipped as freight; without some such peculiar circumstances, they cannot be considered as within the scope of the carrier's contract with the passenger.¹¹ Dogs, it seems, are not baggage. But where the passenger placed his dog in charge of the baggageman on a train, and paid for his transportation, without notice of a rule that such fees were baggagemen's perquisites, it was held that he was entitled to recover of the company for the loss of the dog.¹²

§ 3. Articles which are comprehended under the Term "Baggage."—Among the articles of comfort, convenience, instruction, or amusement which a travel-

Stone, *supra*; Jordan v. Fall River R. Co., *supra*; Duffy v. Thompson, *supra*; Weed v. Saratoga etc. R. Co., *supra*.

¹ Bell v. Drew, 4 E. D. Smith, 59; Cincinnati etc. R. Co. v. Marcus, 38 Ill. 219; Hellman v. Holladay, 1 Woolw. 365; Torpey v. Williams, 3 Daly, 162; The Ionic, 5 Blatchf. 538; Walsh v. Str. H. M. Wright, 1 Newb. Adm. 494; Steers v. Liverpool etc. R. Co., 57 N. Y. 1; Nevins v. Bay State Steamboat Co., 4 Bosw. 225; Michigan etc. R. Co. v. Carrow, 73 Ill. 348; Cadwallader v. Grand Trunk R. Co., 9 Lower Canada Rep. 169.

² McCormick v. Hudson River R. Co., 4 E. D. Smith, 181; McGill v. Rowand, 3 Pa. St. 451; Jones v. Voorhees, 10 Ohio, 145; American Contract Co. v. Cross, 8 Bush, 472; Brooke v. Pickwick, 4 Bing. 218; Fraloff v. New York etc. R. Co., 10 Blatchf. 16; Torpey v. Williams, 3 Daly, 162; McDougall v. Torrance, 4 Lower Canada Jur. 132. *Aliter*, Bomar v. Maxwell, 9 Humph. 621; McDougall v. Allan, 6 Lower Canada Jur. 233; s. c. 12 Lower Canada Rep. 321.

³ Dunlap v. International Steamboat Co., 98 Mass. 371; Weed v. Saratoga etc. R. Co., 19 Wend. 534; Becher v. Great Eastern R. Co., L. R. 5 Q. B. 241; s. c. 22 L. T. (N. s.) 299; 18 Week. Rep. 627; 39 L. J. (Q. B.) 122; Chi-

cago etc. R. Co. v. Boyce, 73 Ill. 510; Dexter v. Syracuse etc. R. Co., 42 N. Y. 326; First National Bank v. Marietta etc. R. Co., 20 Ohio St. 260; Mississippi etc. R. Co. v. Kennedy, 41 Miss. 671.

⁴ Dunlap v. International Steamboat Co., 98 Mass. 371.

⁵ Dexter v. Syracuse etc. R. Co., 42 N. Y. 326; Curtis v. Delaware etc. R. Co., 74 N. Y. 116.

⁶ Nevins v. Bay State Steamboat Co., 4 Bosw. 225; The Ionic, 5 Blatchf. 538.

⁷ Hudson v. Midland etc. R. Co., 10 Best & S. 504; s. c. L. R. 4 Q. B. 366.

⁸ Nevins v. Bay State Steamboat Co., 4 Bosw. 225.

⁹ Phelps v. London etc. R. Co., 19 C. B. (N. s.) 321; s. c. 11 Jur. (N. s.) 652; 34 L. J. (C. P.) 259; 13 Week. Rep. 782; 12 L. T. (N. s.) 496; Thomas v. Great Western R. Co., 14 Upper Canada Q. B. 389.

¹⁰ Hirschsohn v. Hamburg American Packet Co., 2 Jones & Sp. 521. And see Oulmit v. Henshaw, 35 Vt. 604.

¹¹ Macrow v. Great Western R. Co., L. R. 6 Q. B. 612; s. c. 40 L. J. (Q. B.) 300; 24 L. T. (N. s.) 618; 19 Week. Rep. 673; Connolly v. Warren, 106 Mass. 146.

¹² Cantling v. Hannibal etc. R. Co., 54 Mo. 385.

Delivery to the Carrier — "Booking," "Checking."

ler may properly carry as baggage, clothing for the passenger has been held to be properly included.¹ It is not necessary that the clothes should be ready for use. A quantity of cloth cut up into patterns for garments are wearing apparel within the meaning of the rule.² The application of the rule seems to be quite liberal in the matter of fire-arms. An early case in Illinois is authority for the doctrine that a pocket-pistol and a pair of duelling pistols are proper articles of baggage for a gentleman.³ But in a later case the court were of opinion that one revolver was sufficient to protect a grocer going into the country to buy butter.⁴ Guns for sporting purposes are proper baggage for a passenger from Europe to New York.⁵ A few books for amusement on the journey are properly baggage;⁶ and so are manuscript books, the property of a student, and necessary to the prosecution of his studies.⁷ But the manuscript of a work intended for publication is not.⁸ An opera-glass may be included in baggage, although the entire journey be made at night;⁹ and so may night-glasses or telescopes, on the presumption that the passenger may reasonably have thought they would be useful to him in the course of an intended voyage across the Atlantic.¹⁰ A reasonable quantity of his tools is proper baggage for a mechanic;¹¹ and so is a case of surgical instruments for a surgeon in the United States army travelling with troops.¹² A few cases have arisen as to the baggage of troops transported for the government by a common carrier, but these are *sui juris*, being governed by special acts and army regulations, and a discussion of them is apart from this subject.¹³

§ 4. Custody of the Baggage—"Booking" and "Checking."—The idea that lies at the foundation of the extraordinary liability of the carrier is that the baggage is in his custody and under his control during transportation. Hence, in order to hold him responsible for its loss, it is material to show that it came into his possession.¹⁴ Thus, to charge a carrier with the loss of personal ornaments packed in a trunk with the baggage of the owner, it must satisfactorily appear that the trunk was not rifled *after* it was so packed, and *before* it reached the possession of the carrier.¹⁵

¹ *Munster v. South-Eastern R. Co.*, 4 C. B. (N. S.) 676; s. c. 4 Jur. (N. S.) 738; 27 L. J. (C. P.) 308; *Duffy v. Thompson*, 4 E. D. Smith, 178; *Doyle v. Kiser*, 6 Ind. 242; *Dibble v. Brown*, 12 Ga. 217; *Baltimore etc. R. Co. v. Smith*, 23 Md. 402.

² *Duffy v. Thompson*, 4 E. D. Smith, 178.

³ *Woods v. Devin*, 13 Ill. 746.

⁴ *Chicago etc. R. Co. v. Collins*, 56 Ill. 212. See also *Davis v. Michigan etc. R. Co.*, 22 Ill. 278.

⁵ *Van Horn v. Kermit*, 4 E. D. Smith, 454. See also *Hawkins v. Hoffman*, 6 Ill. 586; *Davis v. Cayuga etc. R. Co.*, 10 How. Pr. 330.

⁶ *Doyle v. Kiser*, 6 Ind. 242.

⁷ *Hopkins v. Westcott*, 6 Blatchf. 64.

⁸ *Hannibal etc. R. Co. v. Swift*, 12 Wall. 262.

⁹ *Toledo etc. R. Co. v. Hammond*, 33 Ind. 379.

¹⁰ *Cadwallader v. Grand Trunk R. Co.*, 9 Lower Canada Rep. 169.

¹¹ *Porter v. Hildebrand*, 14 Pa. St. 129; *Davis v. Cayuga etc. R. Co.*, 10 How. Pr. 330.

¹² *Hannibal etc. R. Co. v. Swift*, 12 Wall. 262.

¹³ See *Hannibal etc. R. Co. v. Swift*, 12 Wall. 262. In England, "public baggage, stores, arms," etc., sent by railway in charge of any of her majesty's forces specified in the 7 and 8 Vict., c. 85, § 12, is "their baggage," no matter what may be the disproportion between the amount of baggage and the number of the force in charge of it, and must be carried by the railway company at the rates imposed by that section.

¹⁴ *McQuesten v. Sandford*, 40 Me. 117; *Forbes v. Davis*, 18 Texas, 268; *Moore v. Str. Evening Star*, 20 La. An. 402; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85; *Michigan etc. R. Co. v. Meyres*, 21 Ill. 627.

¹⁵ *McQuesten v. Sandford*, *supra*.

Notes.

In this country it is customary upon railroads, and sometimes upon steamboats, to give the passenger a bit of brass metal with a number upon it, a duplicate of which is attached to his baggage. This is called a baggage-"check," and its delivery is *primâ facie* evidence that the carrier has received the baggage which it represents.¹ Such evidence, of course, may be overcome by proof to the contrary; but the burden of proof under such circumstances is upon the carrier to show non-delivery.² And it is immaterial at what time the baggage comes into the possession of the carrier, — whether at the time the check is issued or subsequently. In either case its liability as an insurer becomes fixed in case of loss.³ The effect and extent to which a baggage-check is evidence is well illustrated by a case where it appeared that a railway company received a passenger's check for baggage which had not then arrived by another road, and gave its own check for the same, and that it had surrendered the passenger's first check to the other railway company. The court held this sufficient, in the absence of proof to the contrary, to show that the baggage was received by the company so surrendering the first check.⁴

But the delivery of a check is not the only, or necessarily the best, evidence of the receipt of the baggage. With the assent of the carrier, the baggage of travellers may be left at a railway station without notice to it or its agents; such assent may be implied from the course of business or custom of the carrier.⁵ And though a regulation of the carrier may require that the baggage of passengers must be checked, yet the carrier cannot avail himself of a failure to comply with this regulation if it appears that, at the time of the delivery of the baggage to the carrier's agent, the passenger demanded a check, and failed to receive it because the person whose duty it was to check baggage was not present.⁶ A corresponding rule obtains in England, where a system of "booking" baggage supplies the place of the checking system of this country. It was held, in an action for lost baggage, that a railway company could not take advantage of a failure of the passenger to comply with a by-law of the company requiring baggage to be "booked," in the absence of evidence that the company had provided the means for booking of baggage.⁷

What constitutes a delivery of baggage is to a great extent a question of fact, to be determined by the jury.⁸ In a case where the only evidence of delivery was that the witness, in whose care the plaintiff came as a passenger, caused the plaintiff's trunk to be placed on board the steamer in New Orleans a short time before her departure, and the jury were instructed by the court that to charge the defendant (the master of the steamer) it must be shown to their satisfaction that the trunk was delivered to the defendant, or to the purser of the steamer, or to

¹ *Davis v. Michigan etc. R. Co.*, 22 Ill. 278; *Chicago etc. R. Co. v. Clayton*, 78 Ill. 616; *Check v. Little Miami R. Co.*, 2 Disney, 238; *Davis v. Cayuga etc. R. Co.*, 10 How. Pr. 330; *Atchison etc. R. Co. v. Brewer*, 20 Kan. 669.

² *Chicago etc. R. Co. v. Clayton*, 78 Ill. 616.

³ *Chicago etc. R. Co. v. Clayton*, *supra*.

⁴ *Chicago etc. R. Co. v. Clayton*, *supra*. See also *Davis v. Michigan etc. R. Co.*, 22 Ill. 278; *Kansas Pacific R. Co. v. Montelle*, 10 Kan. 119.

⁵ *Green v. Milwaukee etc. R. Co.*, 38 Iowa, 100. See also *Minter v. Pacific R. Co.*, 41 Mo. 503; *Najac v. Boston etc. R. Co.*, 7 Allen, 329; *Camden etc. R. Co. v. Belknap*, 21 Wend. 354.

⁶ *Freeman v. Newton*, 3 E. D. Smith, 246. See also *Hickox v. Nangatuck R. Co.*, 31 Conn. 281.

⁷ *Great Western R. Co. v. Goodman*, 12 C. B. 313; *s. c.* 16 Jur. 862; 21 L. J. (C. P.) 197.

⁸ *Dibble v. Brown*, 12 Ga. 217; *Flaherty v. Greenman*, 7 Daly, 481.

Theft while in Control of Passenger.

some other person authorized to receive it on the part of the steamer, and the jury found for the plaintiff, the court above refused to reverse the judgment on the ground that the evidence was insufficient to show delivery of the trunk to the employees of the steamer.¹ In a case where a portmanteau was left outside of the cabin on a steamboat, one of the employees of the boat saying that it would be safe there, these facts were held to be sufficient to charge the owner of the boat with its loss.² But where a passenger by railway entered a car just before the train started, left his valise on a vacant seat and went out, and upon his return found the valise was gone, and it did not appear that any one was in charge of the train at the time, the court held that there was no sufficient delivery of the valise to the defendant.³ Nor, in another case, was the defendant liable for the loss of a trunk said to contain a large sum of money, which the plaintiff left in charge of the baggage-keeper contrary to the advice and instructions of the captain of the steamer, who indicated the office as the proper place of deposit, the plaintiff stating at the time, in answer to the captain, that he would take care of the trunk himself.⁴ Mere voluntary assistance by the agents of the company in looking for lost baggage, or an offer by way of gratuity to pay on account of it, is not such evidence that the baggage was ever in their possession as to render a railroad company liable for its loss.⁵

But where the route for which the ticket is sold and the check given extends over several connecting lines of railway, a check given by one of them will not be evidence against any of the roads except the one issuing the check, although the names of all of them be stamped upon it.⁶ But the relations, duties, and liabilities of connecting lines of railway are more fully discussed elsewhere in this work, under the head of CONNECTING LINES,⁷ to which the reader is referred.

§ 5. *Baggage under the Personal Control of the Passenger—Theft of.*—An essential element of the extraordinary liability of innkeepers and common carriers is the custody of the property of the guest, shipper, or traveller, as the case may be. Questions as to the effect of the owner's assumption of the custody of the goods while in the hands of the carrier or innkeeper, upon the legal liability of the latter, arose very early in England. The cases exhibit a conflict of authority. Thus, we find it decided that the East India Company, which was accustomed, in unloading goods from their vessels, to send an officer along in the lighter, who, as soon as the lading was taken, put the company's lock on the hatches and went with the goods to see them safely delivered at the warehouse, could not under such circumstances recover of the lighterman for a part of the goods which were lost.⁸ And an innkeeper was held not to be liable for goods which were lost out of a private room of the inn, chosen by his guest for the exhibition of the goods to his customers, after he had informed his guest that there was a key to the room by which he might lock the door, which the guest neglected to do.⁹

¹ *Forbes v. Davis*, 18 Texas, 268.

² *Bankier v. Wilson*, 5 Lower Canada Rep. 203.

³ *Kerr v. Grand Trunk R. Co.*, 24 Upper Canada C. P. 209.

⁴ *Senecal v. Richelieu Co.*, 15 Lower Canada Jur. 1.

⁵ *Michigan etc. R. Co. v. Meyres*, 21 Ill. 627.

⁶ *Kessler v. New York etc. R. Co.*, 61 N. Y. 538; s. c. 1 Abb. N. C. 549; 7 Lans. 62; *Furstenheim v. Memphis etc. R. Co.*, 9 Heisk. 238.

⁷ *Ante*, Chap. XIII.

⁸ *East India Co. v. Pullen*, Stra. 690.

⁹ *Burgess v. Clements*, 4 Man. & Sel. 305.

Notes.

But in the case of *Robinson v. Dunmore*¹ the court held that if A. sends goods by B., who says, "I will warrant they shall go safe," B. is liable if they are lost or injured, notwithstanding A. sends one of his own servants in B.'s cart to look after them. The court endeavored to distinguish this case from that of *East India Company v. Pullen*, cited above, by saying that that company never intrust their goods to a lighterman, but give the whole charge of their property to one of their officers, who is called a guardian. But in view of the facts of the two cases, this distinction appears more ingenious than real. *Calye's Case*² is authority for a corresponding doctrine with reference to innkeepers.

A recent and well-considered case,³ in which all the authorities are reviewed at length, applies, in a slightly modified form, the doctrine of *East India Company v. Pullen* to the case of a passenger who takes his portmanteau with him into a railway carriage. The court say: "It is obvious, at least with respect to articles which are not put in the usual luggage-van and of which the entire control is not given to the carrier, but which are placed in the carriage in which the passenger travels, so that he and not the company's servants has *de facto* the entire control whilst the carriage is moving, the amount of care and diligence reasonably necessary for their safe conveyance is, in fact, considerably modified by the circumstance of their being, during that part of the journey in which the passenger might under ordinary circumstances be expected to be in the carriage, intended by both parties to be under his personal inspection and care. To such a state of things the rule which binds common carriers absolutely to insure the safe delivery of the goods, except against the act of God or the queen's enemies, whatever may be the negligence of the passenger himself, has never, that we are aware of, been applied." * * * There is great force in the argument that where articles are placed, with the assent of the passenger, in the same carriage with him, and so in fact remain in his own control and possession, the wide liability of the common carrier which is founded on the bailment of the goods to him, and his being intrusted with the entire possession of them, should not attach, because the reasons which are the foundation of the liability do not exist. In such cases, the obligation to take reasonable care seems naturally to arise; so that when loss occurred, it would fall on the company only in the case of negligence in some part of the duty which pertained to them."⁵

Some limitations of this rule are very clearly expressed by the English Court of Queen's Bench in the case of *Le Conteur v. London, etc. Railway Company*,⁶ There, the passenger carried with him a chronometer, which by his direction the railway porter placed upon his seat in the carriage. He then went to look after the rest of his luggage, and returned after an absence of ten or fifteen minutes, when the chronometer was missing. Upon these facts, COCKBURN, C. J., said:
 "When the case was first opened, I had imagined that the facts were such as to lead to the necessary inference that the plaintiff had taken possession of the chronometer, withdrawing it from the custody of the company and keeping it

¹ 2 Bos. & Pul. 419.

² 8 Co. 63.

³ *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44.

⁴ *Id.* 51.

⁵ *Id.* 52. See also *Bergheim v. Great Eastern R. Co.*, 17 Am. L. Reg. 779; s. c. 6 Cent.

L. J. 222; 18 Alb. L. J. 32; 3 C. B. Div. 221; 38 L. T. (N. S.) 160; *Glover v. London etc. R. Co.*, L. R. 3 Q. B. 25.

⁶ L. R. 1 Q. B. 54; s. c. 35 L. J. (Q. B.) 40; 12 Jur. (N. S.) 266; 14 Week. Rep. 80; 13 L. T. (N. S.) 325.

 Theft while in Control of Passenger.

in his own personal custody and charge; but I think my first impression was incorrect. I think it appears that what took place was this: that by the desire of the plaintiff, the porter of the company placed this article in a carriage in which a particular seat was to be appropriated to the use of the plaintiff. I am very far from saying that there may not in these cases sometimes be a state of circumstances in which a passenger who has luggage which, by the terms of the contract, the company are bound to convey to the place of destination along with him, may not release the company from their obligation as carriers for the safe custody of the article, by taking it into his own personal custody and charge. But I think the circumstances must be strong to relieve the company from their liability. It is not because the article that is part of the passenger's luggage to be conveyed with him is, by the joint consent of the passenger and the company, placed in a carriage with him that the company are necessarily released from their obligation to carry safely. Nothing could be more inconvenient than that the practice of placing small articles which it is convenient to the passenger to have with him in the carriage in which he is about to ride should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safely carrying such articles, it would follow that no one who has occasion to leave the carriage temporarily would be able to have them with him with any degree of safety. I cannot think, therefore, we ought to come to any conclusion which would relieve the company, under such circumstances, from the obligation as carriers to carry the luggage safely, which for general convenience ought certainly to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances indeed, and circumstances leading irresistibly to the conclusion that the passenger takes such personal control and charge of his luggage as to altogether give up all hold upon the company, before we can say that the company, as common carriers, would not be liable in the event of the loss."

This language is an excellent expression of the doctrine of the American cases, though it must be confessed that it is very difficult to draw the line of demarcation between those circumstances which will be considered an assumption of the charge of his baggage, *animo custodiendi*, by a passenger, and those which indicate merely a desire to avail himself of personal conveniences which he carries in it, without assuming custody of it for safe-keeping. In a Wisconsin case, a traveller deposited his valise in a state-room of a steamer while he went to get his trunk checked. He asked for a key to the state-room, but was informed that they gave no keys, and put his valise in the unlocked state-room, calling the attention of two or three cabin or saloon boys to it, and asked their opinion as to whether it would be safe. Receiving an affirmative answer, he went away. The valise, during his absence of about three-quarters of an hour, was lost or stolen. The court held that there was not a sufficient delivery into the custody of the carrier to charge him for the loss.¹ There is a similar ruling in a recent Pennsylvania case.²

Where the jewelry usually worn by two ladies as a part of their apparel was

¹ Gleason v. Goodrich Transp. Co., 32 Wis. 85. Compare Kinsley v. Lake Shore etc. R. Co., 19 Alb. L. J. 113.

² American Steamship Co. v. Bryan, 83 Pa. St. 446.

Notes.

left by them in a carpet-bag in their state-room on a steamboat, and was stolen while they were at supper, the court held that the boat was not liable for the loss.¹ Where the plaintiff, a German emigrant and steerage-passenger from Liverpool to New York, took his trunk with him into the steerage and placed it under his bed, and fastened it with ropes to his berth, the court considered that his conduct in relation to it plainly indicated that he relied upon his own care and vigilance to protect himself against loss, and refused to hold the carrier liable when it appeared that during a violent storm the ropes were cut and the trunk stolen.² But several cases have held that taking his baggage with him to his state-room on a steamboat is not such an assumption of custody on the part of the passenger as will relieve the carrier from liability for its loss.³

The Supreme Court of the United States held, in a case where the baggage, stores, etc., of a body of troops was transported, and the soldiers went along with it for the purpose of guarding it against the attacks of guerillas, that such circumstances would not relieve the railway company from a loss consequent upon fire.⁴

Where the assumption of custody on the part of the passenger is only partial, and the baggage comes again into the hands of the carrier's servants before the final delivery to the passenger, and is then lost, the carrier is responsible for the loss. Thus, in a case where a lady was a passenger by railway, and her dressing-case was put under her seat in the railway carriage, and upon arrival at her destination the porters of the company took upon themselves the duty of carrying her luggage to the hackney coach which was to convey her to her residence, and the dressing-case was lost, the court held that the duty of the carrier continued until the luggage was placed in the hackney carriage, and that the plaintiff was entitled to recover for the loss.⁵

The fact that the passenger retains custody of his baggage relieves the carrier of his extraordinary liability as insurer only. For all losses consequent upon the negligence of the carrier or his servants he still remains liable.⁶ Thus, a passenger upon the defendant's steamship had his baggage in his state-room, which was kept open, according to the custom of the vessel, for purposes of ventilation; the state-room opened into a passage-way, which in turn opened into the cabin. A light was always kept burning and a watchman on duty at night in the cabin. The duty of keeping watch was performed by the stewards and waiters of the vessel, and was in addition to their daily duties. The watchman on duty was required by the rules to report every hour to the officer on the

¹ *The R. E. Lee*, 2 Abb. C. C. 49. See also *Del Valle v. Str. Richmond*, 27 La. An. 90; *Williams v. Keokuk etc. Packet Co.*, 3 Cent. L. J. 400; *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302; *Tower v. Utica etc. R. Co.*, 7 Hill, 47; *Weeks v. New York etc. R. Co.*, 72 N. Y. 50; s. c. 6 Reporter, 54; 17 Am. L. Reg. 506; *Abbott v. Bradstreet*, 55 Me. 530; *Clark v. Burns*, 118 Mass. 275.

² *Cohen v. Frost*, 2 Duer, 335. See also *Welch v. Pullman Palace-Car Co.*, 16 Abb. Pr. (N. S.) 352.

³ *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. (N. S.) 229; s. c. 9 Am. L. Reg. (N. S.)

237; *Gore v. Norwich etc. Transp. Co.*, 2 Daly, 254; *Walsh v. Steamboat H. M. Wright*, 1 Newb. Adm. 494; *Mudgett v. Bay State Steamboat Co.*, 1 Daly, 151.

⁴ *Hannibal etc. R. Co. v. Swift*, 12 Wall. 262.

⁵ *Richards v. London etc. R. Co.*, 7 C. B. 839; s. c. 6 Eng. Rail. Cas. 49; 13 Jur. 986; 18 L. J. (C. P.) 251. See also *Butcher v. London etc. R. Co.*, 16 C. B. 13.

⁶ *American Steamship Co. v. Bryan*, 83 Pa. St. 446; *Kinsley v. Lake Shore etc. R. Co.*, 19 Alb. L. J. 113; *Williams v. Keokuk etc. Packet Co.*, 3 Cent. L. J. 400.

 Respondeat Superior.

bridge. The passenger's two valises were stolen from his room while he was asleep. It appeared that on the night in question the watchman, while reporting at the bridge, had stopped to get a cup of coffee; and that state-rooms on both sides of the cabin were robbed on the same night. There was slight evidence tending to show that the theft was committed by a passenger. In an action against the carrier to recover the value of his lost baggage, the jury found a verdict for the plaintiff, subject to a reserved point as to whether there was any evidence of negligence. The court held that these facts were evidence of negligence to go to the jury.¹

§ 6. Articles received in other Capacity than as a Carrier.—In order to hold the carrier to his liability as such for the loss of baggage, it must appear not only that the baggage came into his custody, but that it was so received in discharge of his public functions as a common carrier. In England there is sometimes attached to a railway station a "cloak-room," as it is called, for the convenience of the public in depositing for temporary safe-keeping such small articles as travellers carry about with them. It has been held that the railway company is liable for the loss of such articles only as a bailee for hire, and not as a carrier.²

In this country, where, upon the conclusion of a journey, the passenger's baggage is at his request kept overnight in a warehouse of the carrier, it has been held that the responsibility of the carrier for such baggage is that of a warehouseman, and not that of a carrier.³ In another case where the plaintiff presented his baggage, the baggage-master, in accordance with a rule of the defendant, declined to check his baggage until the passenger procured passage-tickets. During the plaintiff's absence for this purpose, the baggage-master caused the baggage to be placed in the car, and upon his return refused to give the plaintiff a check until he paid for the extra weight. The plaintiff refused to pay, and demanded his baggage, which the baggage-master declined to deliver, because, being covered with other baggage, it was impossible to reach it without delaying the train. The plaintiff declined to take passage without his checks, and the baggage was carried through to Chicago, where, the night after its arrival, it was destroyed by fire. The action was for its conversion, and the court held that the relation of the parties was not that of common carrier and passenger; that the defendant could not avail itself of any of the rules which have been established as to the liabilities of carriers; and that the defendant was responsible for the act of its servant in withholding the plaintiff's property.⁴

§ 7. A Question of Respondeat Superior.—Questions of agency sometimes arise in this connection. The general rule is, that whosoever the carrier per-

¹ American Steamship Co. v. Bryan, 83 Pa. St. 446.

² Van Toll v. South-Eastern R. Co., 12 C. B. (N. S.) 75; s. c. 31 L. J. (C. P.) 241; 8 Jur. (N. S.) 1213; 10 Week. Rep. 578; 6 L. T. (N. S.) 244; Stallard v. Great Western R. Co., 2 Best & S. 419; s. c. 8 Jur. (N. S.) 1076; 31 L. J. (Q. B.) 137; 10 Week. Rep. 488; 6 L. T. (N. S.) 217; Harris v. Great Western R. Co., 1 Q. B. Div. 615; Parker v. South-Eastern R. Co., 2 C. P.

Div. 416. A packet or sealed letter, with bank-notes enclosed, delivered by a passenger to the clerk of a steamboat for safe keeping, is simply a contract of deposit between them, in which the depositary is only responsible for ordinary care. Wilcox v. The Philadelphia, 9 La. 80.

³ Pike v. Chicago etc. R. Co., 40 Wis. 583.

⁴ McCormick v. Penn. etc. R. Co., 49 N. Y. 303.

Notes.

mits to assume and perform his duties with reference to passengers' baggage, is to that extent and for that purpose to be regarded as his agent, and the carrier is accordingly held liable for his default and neglect. Thus, a porter on a steamboat, whose habit it was to take charge of passengers' baggage, though not one of the boat's crew nor paid by the boat, but receiving his compensation from passengers, was nevertheless held to be the agent of the carrier for the care of such baggage, and the latter was accordingly liable for the loss of baggage while in his custody and charge.¹ And where a passenger upon a railway delivered his baggage into the charge of the conductor or porter of a sleeping-car, and it was lost, the carrier was not permitted to defend on the ground that the car was owned and the servants employed by a third party and not by the defendant, because it did not appear that the passenger was aware of these facts.²

The commissioners of emigration of the State of New York, not being engaged or interested in the transportation of passengers or baggage, or in the care of baggage after it is landed, and having no agents who are so engaged, are not responsible for the loss of baggage delivered by an emigrant on board a ship in the harbor of New York to the crew of a tug-boat, to be transported to Castle Garden. The licensing of the owners or captains of steamboats, etc., to receive and land passengers and their baggage, and of persons to solicit emigrant passengers and baggage for boarding-houses and transportation lines, by the commissioners of emigration, does not make the licensed persons the agents of the commissioners, or render the latter responsible for their good conduct.³

A similar conclusion was reached in an English case. A cab, running in the usual way in the streets of London, was hired by a person to carry his baggage. The baggage was lost through the fault of the driver. On the cab was the name of the defendant as proprietor of it, which he was in fact. But a third person, a licensed driver, was driving at the time. On the trial, it appeared that the driver each day paid a sum of money to the proprietor for the use of the cab and two horses for the day, and then made what he could by the use of the cab and horses. The court held that the driver must be taken to be the agent of the proprietor, with authority to make contracts for the employment of the cab on his account, and consequently that the action was rightly brought against the proprietor.⁴

§ 8. The Contract in Respect of the Carriage of Baggage—A Carrier of Passengers is responsible as a Common Carrier for the Safe Carriage of Baggage.—The contract to carry a passenger includes the obligation to carry such articles as are properly comprehended under the term "baggage," or, as it is called in the English books, "luggage," without extra charge.⁵ But there are

¹ Perkins v. Wright, 37 Ind. 27. See also Torpey v. Williams, 3 Daly, 162; Jordan v. Fall River R. Co., 5 Cush. 69; Ouimit v. Henshaw, 35 Vt. 604; Blair v. Erie R. Co., 66 N. Y. 313.

² Kinsley v. Lake Shore etc. R. Co., 19 Alb. L. J. 113. See, in this connection, Thorpe v. New York etc. R. Co., 13 Hun, 70; s. c. 19 Alb. L. J. 471.

³ Murphy v. Commissioners of Emigration, 28 N. Y. 134; Semler v. Commissioners of Emigration, 1 Hilt. 244.

⁴ Powles v. Hider, 6 El. & Bl. 207; s. c. 2 Jur. (N. s.) 472; 25 L. J. (Q. B.) 331.

⁵ Orange County Bank v. Brown, 9 Wend. 85; Peixotti v. McLaughlin, 1 Strobh. 468; Woods v. Devin, 13 Ill. 746; Merrill v. Grinnell, 30 N. Y. 594; Chicago etc. R. Co. v. Fahey, 52 Ill. 81; Cincinnati etc. R. Co. v. Marcus, 38 Ill. 219; Hannibal etc. R. Co. v. Swift, 12 Wall. 262; Fairfax v. New York etc. R. Co., 5 Jones & Sp. 516; The Elvira Harbeck, 2 Blatchf. 336; Glasco v. New York etc. R. Co., 36 Barb. 557; Perkins v. Wright, 27

 Liable as an Insurer.

two distinct measures of responsibility which are applicable to the functions of the carrier as to the person of the passenger and his baggage. A passenger-carrier is not liable as an insurer for any injury which the person of the traveller may sustain while in his hands; but a carrier of goods, with the familiar exceptions, incurs an absolute responsibility for the safety of the goods which are committed to his care, or is responsible in the same degree as an innkeeper is for the safe-keeping of the property of his guest. The reason is plain. The carrier of goods and the innkeeper have opportunities and temptations for theft, robbery, or combinations with thieves which are practically unlimited, and therefore the policy of the law requires that they should be held answerable for all loss or damage to the property committed to their charge, without reference to the question of the degree of care actually exercised by them, unless such loss proceed from "the act of God or the king's enemies."¹

The reasons of this rule are inapplicable to carriers of passengers, and therefore the carrier is not responsible for an injury to the person of the passenger unless it be shown to have resulted in some way from the carrier's negligence.² But with reference to the baggage of the passenger the position in which the carrier is placed is practically the same as that of the common carrier in regard to goods intrusted to his charge; and for this reason the former is liable to the same extent for the safe carriage and delivery of the baggage of passengers received by him, notwithstanding the fact that he receives therefor no compensation beyond the fare of the passenger.³ But to entitle the plaintiff to have his

Ind. 27; *Hutchings v. Western etc. R. Co.*, 25 Ga. 61; *Hirschsohn v. Hamburg etc. Packet Co.*, 2 Jones & Sp. 521; *Mississippi etc. R. Co. v. Kennedy*, 41 Miss. 671; *Wilson v. Grand Trunk R. Co.*, 56 Me. 60; *Smith v. Boston etc. R. Co.*, 44 N. H. 325; *Powell v. Myers*, 26 Wend. 591; *Camden etc. R. Co. v. Burke*, 13 Wend. 611; *Pardee v. Drew*, 25 Wend. 459.

¹ *Coggs v. Bernard*, 1 Smith's Ld. Cas. 283; s. c. 2 Ld. Raym. 969.

² *Camden etc. R. Co. v. Burke*, 13 Wend. 611.

³ *Orange County Bank v. Brown*, 9 Wend. 85; *Peixotti v. McLaughlin*, 1 Strobh. 468; *Woods v. Devin*, 13 Ill. 746; *Hawkins v. Hoffman*, 6 Ill. 586; *Merrill v. Grinnell*, 30 N. Y. 594; *Bomar v. Maxwell*, 9 Humph. 621; *Chamberlain v. Western Transp. Co.*, 45 Barb. 218; *Camden etc. R. Co. v. Burke*, 13 Wend. 611; *Bayliss v. Lintott*, L. R. 8 C. P. 345; s. c. 42 L. J. (C. P.) 119; 28 L. T. (N. S.) 666; *Blossman v. Hooper*, 16 La. An. 160; *Chicago etc. R. Co. v. Fahey*, 52 Ill. 81; *Dill v. South Carolina R. Co.*, 7 Rich. 158; *Dibble v. Brown*, 12 Ga. 217; *Hannibal etc. R. Co. v. Swift*, 12 Wall. 262; *Fairfax v. New York etc. R. Co.*, 5 Jones & Sp. 516; *The Elvira Harbeck*, 2 Blatchf. 336; *Glasco v. New York etc. R. Co.*, 36 Barb. 557; *Perkins v. Wright*, 37 Ind. 27; *Moore v. Str. Even- ing Star*, 20 La. An. 402; *Wilson v. Ches-*

apeake, 21 Gratt. 654. In two of the earliest cases on this subject a contrary rule was declared. In the case of *Middleton v. Fowler*, 1 Salk. 282, determined in 1699, Lord Holt said that an action would not lie against the owner of a stage-coach for the loss of the trunk of a passenger, because nothing was paid for the carriage of the *trunk* as distinct from the passage-money of the traveller. A similar view prevailed also in *Upshare v. Aidae*, 1 Comyns 25, determined in 1697. A decision of the New York Court of Common Pleas goes to the other extreme. The action was against a street-car company for the loss of a satchel which was inadvertently left in one of the defendants' cars and in pursuance of a regulation of the company was carried to the depot of the company and placed in the hands of the receiver of the road, whose duty it was to keep it for the owner. He delivered it to a person who was not the owner of it, who demanded it, saying it was the property of her mistress. The court, while admitting that the contract for carriage in this instance did not involve the obligation to carry such articles, nor the extraordinary liability for their safe-keeping which the law imposes upon passenger-carriers with respect to baggage, held that the defendants were nevertheless liable, because they had by a general regulation made

Notes.

personal baggage thus carried, it is necessary that he should travel upon the same train with his baggage. If he intrusts it to another, as where a gentleman directed his servant to take his portmanteau by one train and he himself followed upon another, this portmanteau was considered as being the baggage of neither, and therefore neither could recover for its loss.¹ And where a person took passage in a vessel and his baggage did not reach him in season to go with him, but was sent after him in another vessel, and a bill of lading given for it by the mate, the court held the case to be precisely similar to that of a shipment of goods; that the owner of the second vessel would have a lien for his freight, and in case of the loss of the baggage would be liable, not merely as a gratuitous bailee, but as a common carrier.² This rule, however, has not been universally applied. Where the passenger pays his fare, and if for any reason the baggage does not arrive in time to go with him on the same train, and the carrier undertakes to forward it on the next, it has been held that he is liable for its loss, as a carrier.³

§ 9. **Responsibility for Extra Baggage.**—For the carriage of articles which accompany the passenger's baggage, but are not such as are properly included in the term, or such as are in excess of the amount established by law or charter regulations as the limits of a passenger's baggage, the carrier is entitled to demand and receive a special compensation in addition to the fare paid by the passenger for the carriage of his person. Where such additional compensation is paid for the carriage of the extra baggage, the carrier is responsible for such baggage in the same manner and to the same extent as the carrier of goods.⁴ But where articles which are not properly baggage are packed with it, whether through the ignorance of passengers or with a purpose to evade the payment of additional charges, and the baggage is received by the carrier without a knowledge of the contents, there is no liability on his part for such articles in case of loss of the baggage. The agreement on the part of the carrier is to carry the passenger and his baggage; as to articles which are not baggage properly, there is no contract whatever between them. In cases where such articles are carried in the baggage of the passenger for the purpose of avoiding the payment of extra charges, such circumstances constitute an actual fraud upon the carrier. It is therefore plain that the carrier is not liable for the value of such articles when lost with the baggage of a passenger.⁵

it a part of the duty of their agents to take charge of property inadvertently left in their cars, and provided at their depot a place for its safe-keeping where the owner might apply for it, and thus assumed the responsibility to deliver it to such person. *Morris v. Third Avenue R. Co.*, 1 Daly, 202.

¹ *Becher v. Great Eastern R. Co.*, L. R. 5 Q. B. 241; s. c. 22 L. T. (N. S.) 299; 18 Week. Rep. 627; 39 L. J. (Q. B.) 122.

² *The Elvira Harbeck*, 2 Blatchf. 336. See also *Graffam v. Boston etc. R. Co.*, 67 Me. 234; *Wilson v. Grand Trunk R. Co.*, 56 Me. 60; s. c. 57 Me 138.

³ *Warner v. Burlington etc. R. Co.*, 22

Iowa, 166; *Flaherty v. Greenman*, 7 Daly, 481.

⁴ *Sloman v. Great Western R. Co.*, 67 N. Y. 208; s. c. 6 Hun, 546; 3 Abb. N. C. 572; *Hellman v. Holladay*, 1 Woolw. 365; *Glaseo v. New York etc. R. Co.*, 36 Barb. 557; *Dibble v. Brown*, 12 Ga. 218; *Camden etc. R. Co. v. Baldauf*, 16 Pa. St. 67; *Stoneman v. Erie R. Co.*, 52 N. Y. 429.

⁵ *Belfast etc. R. Co. v. Keys*, 9 H. L. Cas. 556; *Hellman v. Holladay*, 1 Woolw. 367; *Great Northern R. Co. v. Shepherd*, 7 Eng. Rail. Cas. 310; s. c. 8 Exch. 30; 21 L. J. (Exch.) 286; *Doyle v. Kiser*, 6 Ind. 242; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *Cahill v.*

Mistakes as to Contents of Parcel.

The correctness of this conclusion is not affected by the *dictum* in a Pennsylvania case. It was there remarked that "neither concealment nor fraud can be imputed to the plaintiff. He was not bound to disclose the nature or value of the goods, unless inquired of by the carrier, in which case he must answer truly."¹ As to the authorities cited in support of this position, one of the cases² is not in point. It was an action for the loss of a trunk which contained articles of baggage proper only, and turned upon the question of whether notice of a regulation of the carrier as to value was brought home to the passenger. The other two were cases of the liability of common carriers of goods,³ and obviously inapplicable to the case of the carriage of such articles without extra charge. It is evident that this rule applies only to those cases where the carrier is not aware of the presence of such additional articles in the baggage. If he is notified of the fact, or if they are carried openly, or so packed that their nature is obvious, and the carrier accepts them for carriage without objection, the law presumes an undertaking on his part to carry them as baggage, and he will be liable for their loss as if they were properly baggage.⁴

But in order to make the company liable under such circumstances, the facts must be such as to leave no room for mistakes. The package must be such as to obviously indicate that its contents are not baggage. Thus, where a traveller carried with him a box covered with a black leather case, on the top of which was painted in the centre, lengthwise, his name, in white letters about two inches long, and on each end of which was painted the word "glass," also in white letters about two inches long, and which had around it two black leather straps between the words "glass," it was held that the appearance of the box did not so plainly indicate that its contents were merchandise as to render the plaintiff liable for its loss. ERLE, C. J., said: "It seems to me that it would be introducing a most pernicious rule to hold that if a package which from its appearance is likely to contain merchandise is brought to a railway by a passenger, the company's servants are bound to inquire whether it consists of what is ordinarily understood to be personal luggage, or merchandise, at the peril of being held liable for a loss if loss occurs."⁵ So in a Canadian case. Here it appeared that the plaintiff delivered to the defendants' servant a box containing only rare plants and roses intended for sale, saying that he would pay for it, and the servant, after examining his ticket, said that there was nothing to pay, and that it might go with the plaintiff in the train. The plaintiff testified that the box was marked somewhere "Plants — Perishable," but he could not say that defendants' officers saw it, and it was sworn that if they had been notified that it

London etc. R. Co., 10 C. B. (N. S.) 154; s. c. 7 Jur. (N. S.) 1164; 30 L. J. (C. P.) 289; 9 Week. Rep. 653; 4 L. T. (N. S.) 246 (affirmed on appeal, 13 C. B. (N. S.) 818; 8 Jur. (N. S.) 1063; 31 L. J. (C. P.) 271; 10 Week. Rep. 391); Michigan etc. R. Co. v. Oehm, 56 Ill. 294; Lee v. Grand Trunk R. Co., 36 Upper Canada Q. B. 350.

¹ Camden etc. R. Co. v. Baldauf, 16 Pa. St. 78, Rogers, J.

² Brooke v. Pickwick, 4 Bing. 218.

³ Phillips v. Earle, 8 Pick. 182; Relf v. Rapp, 3 Watts & S. 21.

⁴ Great Northern R. Co. v. Shepherd, 7 Eng. Rail. Cas. 310; s. c. 8 Exch. 30; 21 L. J. (Exch.) 236; Stoneman v. Erie R. Co., 52 N. Y. 429; Hellman v. Holladay, 1 Woolw. 365; Minter v. Pacific R. Co., 41 Mo. 503. But see Blumantle v. Fitchburg R. Co., 20 Alb. L. J. 354.

⁵ Cahill v. London etc. R. Co., 10 C. B. (N. S.) 154; s. c. 7 Jur. (N. S.) 1164; 30 L. J. (C. P.) 289; 9 Week. Rep. 653; 4 L. T. (N. S.) 246 (affirmed on appeal, 13 C. B. (N. S.) 818; 8 Jur. (N. S.) 1063; 31 L. J. (C. P.) 271; 10 Week. Rep. 391).

Notes.

was freight or merchandise it would not have been taken. On these facts the court held that the defendants were not liable.¹

§ 10. *Baggage of Gratuitous Passenger.*—Public policy requires that common carriers should exercise the same extreme care for the safety of persons carried gratuitously which the law demands of them when carrying passengers for hire.² With respect to the baggage of persons riding free, the case is altogether different, and the rule of public policy does not apply. The carrier is not the insurer of his passengers, but is required to use extreme care and diligence to provide for their safety. As to the baggage of such passengers he is, with the familiar exceptions, an insurer, and the theory is that his compensation as insurer is represented by the fare paid for the carriage of the passenger. Where the carriage is gratuitous, it would seem to be a hardship to require of him this high degree of liability for the safe carriage of baggage for the carriage of which he receives no compensation. A more equitable view would render him liable only as a gratuitous bailee. It was so held by Chief Justice COOLEY in a recent decision of the Supreme Court of Michigan.³ But, so long as the passage-money is paid, it is not indispensable that it should be paid in advance in order to hold a carrier liable for the loss of baggage.⁴ Nor does it matter whether it is paid by the passenger himself, or by some other person for him.⁵

§ 11. *Lien upon Baggage for Fare.*—The carrier is liable "*in respect of his reward*," as the old cases put it, and a carrier of goods has a lien upon them to secure unpaid freight. So too a carrier of passengers may retain the baggage of a traveller to secure the payment either of his fare or of charges for extra baggage.⁶ LAWRENCE, J., said, in an early English case: "The master of a ship has certainly no lien on the passenger himself, or the clothes which he is actually wearing when he is about to leave the vessel, but I think the lien does extend to any other property he may have on board. A certain sum is agreed to be given for carrying the man and the luggage. I think the captain has a lien for this upon the luggage. In detaining that, there is no greater inconvenience than in the common case of goods and merchandise carried on freight, and there is no reason why there should not be the same lien for the recovery of passage-money as for the recovery of freight."⁷

§ 12. *Carriers of Baggage only.*—In a case in the New York Superior Court, the distinction between baggage proper and articles improperly packed with it

¹ Lee v. Grand Trunk R. Co., 36 Upper Canada Q. B. 350.

² Phila. etc. R. Co. v. Derby, *ante*, p. 31.

³ Flint etc. R. Co. v. Wier, 37 Mich. 111. But see Bean v. Green, 12 Me. 422; Mobile etc. R. Co. v. Hopkins, 41 Ala. 493; Malone v. Boston etc. R. Co., 12 Gray, 388.

⁴ Van Horn v. Kermit, 4 E. D. Smith, 454; McGill v. Rowand, 3 Pa. St. 451; Flaherty v. Greenam, 7 Daly, 481; Block v. The Steamboat Trent, 18 La. An. 664.

⁵ Marshall v. York etc. R. Co., 11 C. B. 655;

s. c. 16 Jur. 124; 21 L. J. (C. P.) 34; Van Horn v. Kermit, 4 E. D. Smith, 454; Malone v. Boston etc. R. Co., 12 Gray, 388; Pearson v. Duane, *ante*, pp. 17, 18, 20.

⁶ Wolf v. Summers, 2 Camp. 631; Rumsey v. North-Eastern R. Co., 14 C. B. (N. S.) 641; s. c. 32 L. J. (C. P.) 244; 11 Week. Rep. 911; 8 L. T. (N. S.) 666; 10 Jur. (N. S.) 208; Nordmeyer v. Loescher, 1 Hilt. 499; Hutchings v. Western etc. R. Co., 25 Ga. 61; South-Western R. Co. v. Bently, 51 Ga. 311.

⁷ Wolf v. Summers, *supra*.

 Contracts limiting Liability.

was extended to the case of carriers of baggage who do not carry the person of the passenger. It held that a city express company, engaged in carrying the trunks of travellers to and from the various passenger-depots in the city, was not responsible for the loss of articles packed in such a trunk which were not properly baggage, on the ground that its contract was to carry a trunk containing the ordinary baggage of a traveller and nothing else.¹ This view is believed to be erroneous. Such a carrier is in an entirely different position from that of a carrier of passengers. He is a carrier of goods, strictly speaking, and if he wishes to be relieved of the risk incident to the carriage of articles of great value, he should take the usual precautions by making suitable regulations looking to that end. If he receives a trunk without inquiries as to the value of its contents, and it is lost, he can blame only his own improvidence if, after loss, he finds that he assumed a greater responsibility than he anticipated.²

§ 13. *Liability of Carrier for Loss of Baggage, how limited by Contract.*—It seems to be well settled that the carrier may by *express* contract limit his liability as insurer of the safe carriage of the passenger's baggage.³ It is not always easy to determine whether such a contract has been made. Some of the cases in which it has been held that the carrier is released from his extraordinary liability by agreement with the passenger are hardly to be distinguished from those in which he has sought to release himself by giving notice that he will not be liable for the loss of baggage. A few examples will suffice. The passage-ticket of a steamship company contained the following conditions: "The ship will not be accountable for luggage, goods, or other description of property, unless bills of lading have been signed therefor." "Each first and second class adult passenger allowed to have twenty cubic feet of luggage free, but no merchandise, plate, jewelry, precious stones, specie, or bullion will be carried as luggage." The court held that the terms of the ticket absolved the carrier from liability for loss of the baggage occasioned by the negligence of the captain.⁴ In another case, the plaintiff paid for his passage and received the following receipt:—

"BINGHAM'S EMIGRANT LINE, PHILA., Oct. 21, 1840.

"No. 156. Received of Messrs. Rogers & McDonald \$32.51, for two seats to Pittsburgh, and 545 pounds extra baggage, including one trunk already forwarded.

"Each passenger is entitled to fifty pounds baggage free. All baggage at the risk of the owner.

BINGHAM & BROTHERS,

"Per M. DAVIS."

This receipt was held to release the carrier from his ordinary liability.⁵

It should be distinctly understood, however, that the general rule is that the

¹ Richards v. Westcott, 2 Bosw. 589.

² Parmelee v. Lowitz, 74 Ill. 116.

³ Wilton v. Royal etc. Nav. Co., 10 C. B. (N. s.) 453; 8 Jur. (N. s.) 232; 30 L. J. (C. P.) 369; 9 Week. Rep. 748; 4 L. T. (N. s.) 706; Moore v. Evans, 14 Barb. 524; Bingham v. Rogers, 6 Watts & S. 495; Atwood v. Reliance Transp. Co., 9 Watts, 87; Laing v. Colder, 8 Pa. St. 479; Peninsular etc. Nav. Co. v. Shand, 11 Jur. (N. s.) 771; s. c. 12 L. T. (N. s.) 803; Zung v. South-Eastern R. Co., 10

Best & S. 594; Davidson v. Graham, 2 Ohio St. 132; s. c. 3 Am. L. Reg. 291.

⁴ Wilton v. Royal etc. Nav. Co., 10 C. B. (N. s.) 452; s. c. 8 Jur. (N. s.) 232; 30 L. J. (C. P.) 369; 9 Week. Rep. 748; 4 L. T. (N. s.) 706. See also Mobile etc. R. Co. v. Hopkins, 41 Ala. 486; Penn. etc. R. Co. v. Schwarzenburg, 45 Pa. St. 203; Laing v. Colder, 8 Pa. St. 479.

⁵ Bingham v. Rogers, 6 Watts & S. 495.

Notes.

power of the carrier to limit his liability by an express contract with the passenger extends only to the carrier's extraordinary liability as insurer. The policy of the law forbids that any bailee for hire should by contract relieve himself from liability for injuries or losses consequent upon the negligence or wilful default of himself or his servants.¹

§ 14. Liability of Carrier for Loss of Baggage, how limited by Notice — English Railway and Canal Traffic Act. — Intimately connected with the foregoing is the consideration of "carriers' notices." A full and complete discussion of these, their origin and effects, and the vacillation which has characterized the English courts in dealing with them, is impracticable within the limits of this note. Furthermore, many of the cases in which the principles governing them have been adjudicated, properly belong to the subject of carriers of goods.² It is sufficient for present purposes that their effect is controlled in England by statutory enactment making railroad and canal companies liable for the loss of any thing received for carriage, notwithstanding any notice, declaration, or condition made or given by such company to the contrary, or in anywise limiting such liability; but providing that nothing contained in the act shall be construed to prevent the company from making *special contracts*³ relative to the carriage of such articles.⁴ This enactment simply restores the doctrines of the common law, and is held to be applicable to carriers of passengers in respect of their liability for the loss of the baggage of passengers.⁵

In this country the cases upon this point are in considerable confusion. In New York it has been so often decided that a carrier cannot, by a general notice to the public, limit his liability, that in that State the question may be considered as settled.⁶ Nor will such a notice have the effect to relieve the carrier of liability even though brought home to the passenger.⁷ The same rule prevails in Ohio.⁸

In Pennsylvania, however, there is a different rule. Such a notice seems to be held equivalent to a contract, and to have the effect, if brought home to the knowledge of the passenger, of limiting or releasing the liability of the carrier as insurer, according to its terms.⁹

§ 15. What will constitute Notice. — Admitting the right of the carrier to restrict his liability for safe carriage of the passenger's baggage, it becomes a material question as to what notice will be sufficient for this purpose. It seems

¹ *Mobile etc. R. Co. v. Hopkins*, 41 Ala. 486; *Davidson v. Graham*, 2 Ohio St. 132; s. c. 3 Am. L. Reg. 291; *Lawson on Car.*, §§ 28, 29, *et seq.*

² Consult upon this subject the recent able and exhaustive analysis of Mr. Lawson, referred to *supra*.

³ *Peninsular etc. Steam Nav. Co. v. Shand*, 11 Jur. (N. s.) 771; s. c. 12 L. T. (N. s.) 808.

⁴ The Railway and Canal Traffic Act, 17 & 18 Vict., c. 31, § 7.

⁵ *Cohen v. South-Eastern R. Co.*, 2 Exch. Div. 253; s. c. 1 Exch. Div. 217.

⁶ *Hollister v. Nowlen*, *ante*, p. 488; *Cole*

v. Goodwin, 19 Wend. 251; *Camden etc. R. Co. v. Belknap*, 21 Wend. 354; *Rawson v. Pennsylvania R. Co.*, 43 N. Y. 212; s. c. 2 Abb. Pr. (N. s.) 220.

⁷ *Clark v. Faxton*, 21 Wend. 153; *Camden etc. R. Co. v. Burke*, 13 Wend. 611.

⁸ *Jones v. Voorhees*, 10 Ohio, 145; *Davidson v. Graham*, 2 Ohio St. 132; s. c. 3 Am. L. Reg. 291.

⁹ *Atwood v. Reliance Transp. Co.*, 9 Watts, 87; *Bingham v. Rogers*, 6 Watts & S. 495; *Laing v. Colder*, 8 Pa. St. 484; *Whitesell v. Crane*, 8 Watts & S. 369.

 What is a Good Notice.

clear that such a notice merely placarded in the office of the carrier cannot have the desired effect, in the absence of evidence that the passenger read it or was aware of its contents.¹

The leading case upon this subject is that of *Henderson v. Stevenson*.² The condition or notice was there printed upon the back of the ticket. The notice itself was totally absurd, as it was intended to operate as a discharge of the carrier from every species of liability to the passenger. However, the case is valuable in the aspect we are considering, as the discussion turned entirely upon the consideration of sufficiency of notice.

In a recent case decided by the Superior Court of New York, it appeared that the agent of a transfer company approached the plaintiff upon the cars, asking for baggage. The plaintiff gave him his check, and received in exchange a printed receipt marked "Domestic Bill of Lading." This receipt contained conditions of carriage releasing the carrier from his liability at law for damages beyond the sum of \$100, unless specially compensated. When the receipt was delivered, the light in the cars was so indistinct that it was impossible to read it, and the plaintiff, upon receiving it, put it into his pocket without attempting to read it. The court held that under such circumstances it did not constitute a contract between the plaintiff and the carrier, and that the liability of the latter was unaffected thereby.³

In an earlier case in the same court, it was said of a condition on a passage-ticket releasing the carrier from liability for the carriage of baggage of value greater than \$100: "We cannot on principle regard such a memorandum, or any memorandum on a passenger's ticket, as constituting a contract between the carrier and the passenger. These tickets are usually received and paid for in the bustle of a crowd, and it is unreasonable to suppose that the passenger reads and assents to the terms of a memorandum printed thereon; besides, they are surrendered to the conductor of the cars or collector on the boat. If contracts, the plaintiff would be entitled to retain them as evidence of his right, as in the case of a bill of lading, until the safe delivery of his baggage. Such tickets are rather tokens or evidences of the right of the passenger to a seat in the cars or accommodation on the boat, from the fact of having paid the fare, and they have fulfilled all their purpose when that right is admitted by the call for and surrender of the tickets."⁴ And in Virginia a very well-considered case is authority for the view that such a condition printed upon the back of a railway ticket will not be binding upon the passenger unless it appears that he read it before the cars started.⁵

In a Massachusetts case, without deciding the vexed question as to the effect of such a condition, the court held that the mere printing of the condition upon the back of a railway ticket, and detached from what ordinarily contains all that is material to the passenger, will not raise a legal presumption that at the time

¹ *Brooke v. Pickwick*, 4 Bing. 218; *Bean v. Green*, 12 Me. 422; *Henderson v. Stevenson*, L. R. 2 Sc. App. 470, 473, per the Lord Chancellor.

² *Supra*.

³ *Madan v. Sherrard*, 10 Jones & Sp. 353. See also *Blossom v. Dodd*, 43 N. Y. 264.

⁴ *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225, 234. See also *Rawson v. Pennsyl-*

vania R. Co., 48 N. Y. 212; *s. c.* 2 Abb. Pr. (N. S.) 220; *Steers v. Liverpool etc. Steam Co.*, 57 N. Y. 1.

⁵ *Wilson v. Chesapeake etc. R. Co.*, 21 Gratt. 654. See also *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212; *s. c.* 2 Abb. Pr. (N. S.) 220; *Henderson v. Stevenson*, L. R. 2. Sc. App. 470.

Notes.

of receiving the ticket, and before the train left the station, the traveller had a knowledge of its terms. The opinion further distinguishes this from the case of a receipt given by a carrier of goods. DEWEY, J., said: "I am aware that, in reference to ordinary merchandise transported by common carriers, it has been held in some cases in the English courts that a ticket given to the owner of merchandise, containing on the face of it a condition or limitation of the liability of the carrier, was held to furnish evidence of the special contract of transportation, sufficient to affect the owner of the merchandise and to limit the liability of the carrier.¹ These cases obviously differ from the present, and fail to satisfy us of the sufficiency of the notice in the case before us."²

There seems, on principle, to be less objection to the doctrine as stated by Mr. Justice SHIPMAN of the United States Circuit Court for the Southern District of New York. It appearing that, at the time the check was given for the trunk, there was delivered with it a paper containing a printed notice that the carrier would not "become liable for merchandise or jewelry contained in baggage received upon baggage-checks, nor for loss by fire, nor for an amount exceeding one hundred dollars upon any article, unless specially agreed for in writing on this check-receipt, and the extra risk paid therefor," together with a statement that the owner thereby agreed that the carrier should be liable only as above, the court held that the passenger was chargeable with notice of the contents of the paper, and that the carrier was liable only in accordance with its terms.³

It is provided by statute in New Jersey that the responsibility of railroad companies as carriers of baggage shall be limited to \$100 for every hundred pounds of baggage, in cases where notice to that effect is given by being placed in a "conspicuous place in the receiving-office for baggage" of the company and "inserted in the tickets given to the passengers."⁴ It was held by the Pennsylvania court, that, in order to take advantage of this act, the carrier must clearly show that the notice was inserted in the passengers' tickets as well as placarded in the office.⁵

§ 16. **An Exception under the Railway and Canal Traffic Act—Excursion Trains.**—There is a class of English cases in which the court hold that, notwithstanding the act of Parliament previously mentioned,⁶ it is competent for the carrier to limit his liability by notice. Where a railway company issued excursion tickets at reduced prices, "subject to the conditions contained in the company's time and excursion bills," and the bills contained this condition, "Luggage under 60 pounds free, *at passenger's own risk*," and the purchaser of one of these tickets had the means of knowing, but did not in fact know, of the condition, it was held that he could not recover for the loss of his baggage during the transit, though it was properly addressed and he was not allowed to retain it under his personal control.⁷ The reason for this decision, though

¹ Citing *Austin v. Manchester etc. R. Co.*, 10 C. B. 454; *Shaw v. York etc. R. Co.*, 6 Eng. Rail. Cas. 87; s. c. 13 Q. B. 347.

² *Brown v. Eastern R. Co.*, 11 Cush. 101.

³ *Hopkins v. Westcott*, 6 Blatchf. 64. See also *New York etc. R. Co. v. Fraloff*, 9 Cent. L. J. 432; s. c. 20 Alb. L. J. 409; 8 Reporter, 801; *ante*, p. 502.

⁴ Rev. N. J. 1877, p. 913, § 27; Acts N. J. 1853, p. 396.

⁵ *Brown v. Camden etc. R. Co.*, 83 Pa. St. 316.

⁶ *Ante*, § 14, The Railway and Canal Traffic Act, 17 & 18 Vict., c. 31, § 7.

⁷ *Stewart v. London etc. R. Co.*, 3 Hurl. & Collt. 135; s. c. 10 Jur. (N. S.) 805; 33 L. J.

Regulations — Notice to Passenger.

not very clearly expressed in the opinion of the court, is evidently that a carrier is under no obligation to make excursion rates for the passenger's carriage, and such rates therefore form essentially a special contract. The time and excursion bills are a proposal on the part of the carrier for a special contract of carriage, and if the passenger has the opportunity of learning from them the terms of the agreement, it is his duty to do so, and the law presumes that he has done so before he assents to the special contract by taking his place in the cars. Permitting a passenger to carry baggage on an excursion train is *ex gratia* at most. If the passenger insists upon going upon an excursion train and carrying his baggage, the company may, in the absence of any agreement to a different effect, demand a compensation for the carriage of such baggage, and hold it until the charges are paid.¹

§ 17. Regulations of the Carrier in respect of Baggage — Notice to Passenger. — Although the correct rule seems to be that a carrier cannot limit his liability by a mere notice that he will not be responsible beyond a certain extent, yet there is no reason, either on principle or the authority of adjudicated cases, why he may not make, for his own protection and for the greater safety of the baggage, such reasonable regulations for the checking, custody, and carriage of the baggage as may be suggested by reason and experience.² But the carrier cannot take advantage of a failure of the passenger to comply with such a regulation, unless the regulation is in itself of a reasonable and proper nature. A regulation forbidding the passenger, who pays an extra price for a state-room on a steamboat, from taking his baggage with him into it, except at his own risk, is not a reasonable regulation so far as it relates to light baggage or hand-satchels containing articles required for use in travel, and a failure of the pas-

(Exch.) 199; 12 Week. Rep. 689; 10 L. T. (N. s.) 302.

¹ Rumsey v. North-Eastern R. Co., 14 Q. B. (N. S.) 641; s. c. 32 L. J. (C. P.) 244; 11 Week. Rep. 911; 8 L. T. (N. S.) 666; 10 Jur. (N. S.) 208. Compare Najac v. Boston etc. R. Co., 7 Allen, 329.

² Macklin v. New Jersey Steamboat Co., 7 Abb. Pr. (N. S.) 229; s. c. 9 Am. L. Reg. (N. s.) 239; Baldwin v. Collins, 9 Rob. (La.) 468; Freeman v. Newton, 3 E. D. Smith, 246; Williams v. Keokuk etc. Packet Co., 3 Cent. L. J. 400; Gleason v. Goodrich Transp. Co., 32 Wis. 86. Of course, a carrier corporation cannot make regulations which are in contravention of the provisions of its charter. The one hundred and sixty-ninth section of the 5 & 6 Wm. IV., c. 107, which incorporated the Great Western Railway, enacts that, without extra charge, it shall be lawful for every passenger travelling upon the railway to take with him articles of clothing not exceeding forty pounds in weight and four cubic feet in dimensions; and that the company shall in no case be responsible for any

things whatsoever carried upon the railway with any passenger, other than such passenger's articles of clothing not exceeding the weight and dimensions aforesaid; provided, that nothing contained in the act shall extend to make the company liable further than where, according to law, stage-coach proprietors and common carriers would be liable. Sect. 144 enables the company to make by-laws "for the good government of the affairs of the company, and for the management of the said undertaking." The company made a by-law that every first-class passenger should be allowed to carry one hundred and twelve pounds of luggage free of charge, but that the company would not be responsible for the care of the same unless booked and the carriage thereof paid for. It was held that the company had no power to make this by-law, since it was in contravention of the one hundred and sixty-ninth section. Williams v. Great Western R. Co., 10 Exch. 15. See also Munster v. South-Eastern R. Co., 4 C. B. (N. S.) 676; s. c. 4 Jur. (N. S.) 738; 27 L. J. (C. P.) 308.

Notes.

senger to comply with it will not exonerate the carrier from liability for the loss of such baggage.¹

Not only must the regulation be reasonable, but it must appear that notice of it was brought home to the passenger.² The carrier, too, must extend to the passenger every facility for complying with the regulation.³ A notice posted in defendant's steamboat, that the owners will not be liable for baggage unless it is checked, will not protect them against the claim of a passenger who delivered his baggage to their agent on board the boat and demanded a check, but failed to obtain it because the person whose duty it was to give checks was not present.⁴

§ 18. **Liability of Carrier limited by Statute.**—It has sometimes been seen fit to limit the common-law liability of carriers by legislative enactment. When this has been done in general terms, it is held that the provision extends to the case of a passenger's baggage equally with that of goods which are delivered for transportation. An act of Congress providing that the owner of a vessel shall not be liable for loss or damage "which may happen to any goods or merchandise whatsoever which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners,"⁵ was held to include in the terms "any goods or merchandise" the ordinary baggage of passengers.⁶

§ 19. **Duties of the Passenger in respect of Baggage during Transit.**—Having delivered his baggage to the carrier, the passenger is charged with no further duty or care concerning it until arrival at his destination. The carrier undertakes to carry the baggage, and this undertaking involves the duty of making all necessary changes of vehicles, transshipments, etc., that may be necessary to accomplish that object. It is not the duty of the passenger to inquire for his baggage at a change of vehicles, nor to see that it is properly shipped, and his failure to do so will not relieve the carrier from a liability for its loss.⁷

§ 20. **Liability of Sleeping-Car Companies for Loss of Baggage and Valuables.**—It seems to be settled by the few adjudged cases upon this subject that sleeping-car companies are to be regarded neither as innkeepers nor common carriers, nor subject to the onerous liabilities of either in respect of the prop-

¹ *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. (N. S.) 229; s. c. 9 Am. L. Reg. (N. S.) 237.

² *Baldwin v. Collins*, 9 Rob. (La.) 468; *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. (N. S.) 229; s. c. 9 Am. L. Reg. (N. S.) 237; *New York etc. R. Co. v. Fraloff*, 20 Alb. L. J. 409; s. c. 9 Cent. L. J. 432; 8 Reporter, 801, *ante*, p. 502.

³ *Great Western R. Co. v. Goodman*, 12 C. B. 313; 16 Jur. 862; 21 L. J. (C. P.) 197.

⁴ *Freeman v. Newton*, 3 E. D. Smith, 246.

⁵ 9 U. S. Stats. at Large, 635, § 1; U. S. Rev. Stats., § 4282. For a full examination of the United States statutes affecting carriers of passengers, see Chap. XV., § 17, *ante*, p. 475.

⁶ *Chamberlain v. Western Transp. Co.*, 44 N. Y. 305; *Chisholm v. Northern Transp. Co.*, 61 Barb. 363. See also *McDougall v. Allan*, 6 Lower Canada Jur. 233. *Contra*, *Dunlap v. International Steamboat Co.*, 98 Mass. 371.

⁷ *Campbell v. Caledonian R. Co.*, 14 Scot. Sess. Cas. (N. S.) 806; *Check v. Little Miami R. Co.*, 2 Disney, 237.

 Liability for Loss of Baggage and Valuables.

erty of those enjoying their accommodations. It is evident that these flying nondescripts do not come within the definition of an inn: "It must be a house kept open publicly for the lodging and entertainment of travellers in general, for a reasonable compensation. If a person lets lodgings only, and upon a previous contract with every person who comes, and does not afford entertainment for the public at large, indiscriminately, it is not a common inn."¹ The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits;² and it seems that it would be such an extension to apply it to the class of cases under discussion. Thus, the keeper of a coffee-house, or private boarding or lodging house, is not an innkeeper in the strict sense of the term.³ The proprietors of the sleeping-car cannot be regarded as liable as carriers, because the contract of carriage has been made with the railroad company;⁴ nor subject to the same liabilities as a carrier providing state-rooms for his passengers, because, from the nature of the accommodations offered, the same security against loss is impossible.⁵

What, then, shall be the measure of responsibility of these companies? All the cases seem to agree that their duty is to exercise at least ordinary care for the security of passengers' valuables. Of course, this care must be in proportion to the danger reasonably to be apprehended. Such danger is greater at night, while the passenger is asleep, than in the daytime, when he is awake and can care for himself.⁶ This point is well stated in a case previously noticed: "The scope of the liability of companies of this kind, so far as I know, has never been judicially determined. It is undoubtedly the law that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss,—as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory, it is insisted by defendant that it cannot be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot for a moment accede to this proposition. It is scarcely necessary to say that a person asleep cannot retain manual possession or control of any thing. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care upon his own part is impossible. There is all the delivery which the circumstances of the case admit. I think it should keep a watch during the night, see to it that no unauthorized persons intrude themselves into the car, and take reasonable care to prevent thefts by the occupants."⁷

Judged by the foregoing standard, the proprietors of a sleeping-car seem to

¹ 2 Kent's Comm. 595; Story on Bail., § 475; Bac. Abr., tit. "Inns and Innkeepers," (C.) See the points of difference well stated by Brown, J., in a case before the United States Circuit Court for the Western District of Tennessee. *Blum v. Southern Pullman Palace-Car Co.*, 3 Cent. L. J. 591.

² *Pullman Palace-Car Co. v. Smith*, 73 Ill. 360, 365; *Blum v. Southern Pullman Palace-Car Co.*, *supra*; *Welch v. Pullman Palace-Car Co.*, 16 Abb. Pr. (N. S.) 352.

³ *Dansey v. Richardson*, 3 El. & Bl. 144; *Holder v. Soulby*, 8 C. B. (N. S.) 254; *s. c.* 29 L. J. (C. P.) 246; 6 Jur. (N. S.) 1031; 8 Week. Rep. 438; *Kisten v. Hildebrand*, 9 B. Mon. 72.

⁴ *Pullman Palace-Car Co. v. Smith*, 73 Ill. 360.

⁵ *Crozier v. Boston etc. R. Co.*, 43 How. Pr. 466.

⁶ *Diehl v. Woodruff*, 10 Cent. L. J. 66.

⁷ *Brown, J.*, in *Blum v. Southern Pullman Palace Car Co.*, 3 Cent. L. J. 591, 592.

Notes.

have been properly held liable for theft of a passenger's valuables where both the conductor and porter of the sleeping-car were asleep for several hours at the rear end of the car, leaving the front door unlocked, and a brakeman of the train only sitting at the other end.¹ Also where the conductor of the car quitted the train at a distance of eighty-four miles from its destination and permitted it to go on with the porter only in attendance, who was engaged chiefly in blacking boots in a room at the end of the car.²

In cases of loss for which these companies are responsible, the measure of liability is the same as that of the common carrier of passengers under similar circumstances. It includes only such property as the passenger may reasonably be supposed to carry about his person. It extends to his clothing and personal ornaments, the small articles of baggage usually carried in the hand, and a reasonable sum of money for travelling expenses.³

§ 21. *Duty of the Carrier to deliver Baggage safely.*—The liability of the carrier is coextensive with his custody of the baggage, and continues until it is safely delivered into the hands of the passenger, or until the latter, by the implication derived from his conduct, relieves the former from his extraordinary responsibility.⁴ To constitute a delivery to the passenger, it is not necessary that the latter should actually receive his baggage, but it is sufficient if he assumes control and direction of it. Thus, a passenger upon the Midland Railway from Gloucester to Bristol, on arriving at Bristol, told the porter that he wished to proceed by the Bristol and Exeter Railway to Torquay. The porter thereupon placed his portmanteau on a truck with other baggage, entered the Bristol and Exeter station with the truck, passed down an incline from the arrival platform, crossed the lines of the railway, and ascended on an incline to the departure platform of the Bristol and Exeter Railway. There was no evidence that the portmanteau was seen afterwards; however, it never reached Torquay. In an action against the Midland Railway, the court held that there was no evidence of a breach of their contract to deliver either to the passenger or at the departure platform of the Bristol and Exeter Railway.⁵

Where it is the custom for the baggage to be delivered by the servants of a vessel to a railway company, and checks received therefor and handed to the passengers on the train, the owners of a vessel were held liable for the loss of a passenger's trunk who received the right number of checks, but one of whose checks called for a trunk not his own, on the ground that there was no delivery to him of his baggage.⁶

¹ *Blum v. Southern Pullman Palace-Car Co.*, *supra*.

² *Diehl v. Woodruff*, 10 Cent. L. J. 66.

³ *Blum v. Southern Pullman Palace-Car Co.*, 3 Cent. L. J. 591; *Diehl v. Woodruff*, 10 Cent. L. J. 66; *Welch v. Pullman Palace-Car Co.*, 10 Abb. Pr. (N. S.) 352; *Palmeter v. Wagner*, 10 Alb. L. J. 149.

⁴ *Butcher v. London etc. R. Co.*, 16 C. B. 13; *s. c.* 1 Jur. (N. S.) 427; 24 L. J. (C. P.) 137; *Richards v. London etc. R. Co.*, 7 C. B. 839; *s. c.* 6 Eng. Rail. Cas. 49; 13 Jur. 986; 18 L. J. (C. P.) 251; *Minor v. Chicago etc.*

R. Co., 19 Wis. 40; *Toledo etc. R. Co. v. Hammond*, 33 Ind. 379; *Patscheider v. Great Western R. Co.*, 3 Exch. Div. 153; *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1; *s. c.* 44 L. J. (Q. B.) 18; 31 L. T. (N. S.) 430; 23 Week. Rep. 25; *Cole v. Goodwin*, 19 Wend. 251; *Onimit v. Henshaw*, 35 Vt. 604; *Mattison v. New York etc. R. Co.* 19 Alb. L. J. 359; *s. c.* 8 Reporter, 440.

⁵ *Midland R. Co. v. Bromley*, 17 C. B. 372; *s. c.* 2 Jur. (N. S.) 140; 25 L. J. (C. P.) 94. See also *Penton v. Grand Trunk R. Co.*, 28 Upper Canada Q. B. 367.

⁶ *Fisher v. Geddes*, 15 La. An. 14.

 What is a Good Delivery.

The question as to what constitutes an arrival at the destination of the passenger, and a conclusion of his journey, is one of fact, dependent for its solution upon the intention of the parties in making the contract for carriage. Where it is not otherwise specially agreed, it will be presumed that the parties had in contemplation a conclusion of the journey in accordance with the established custom and usage of the carrier. Thus, the plaintiff was a steerage-passenger from Hamburg to New York. On arrival at the latter port, the vessel terminated her voyage at Hoboken, opposite the city of New York, that being the place where, according to the established usage and custom of the defendants, all their passengers and their baggage were landed. At that place the plaintiff's baggage was placed upon the pier, was opened by the plaintiff for the examination of the customs-officer, and was then taken charge of by the subordinates or employees of the commissioners of emigration, by whom it was transported to the emigrant-depot in the city of New York, as required by the statute regulating the landing of emigrant passengers in the port of New York. The court held that in the absence of proof of a contract on the part of the defendants to transport the plaintiff and his baggage to the city of New York, the defendants were discharged from any further obligation as to the baggage, on its delivery to the commissioners of emigration at Hoboken.¹ A voyage from one seaport to another is not concluded at the quarantine of the port of destination, but the carrier may be excused from the complete fulfilment of his contract by the quarantine regulations. He must, however, make a delivery of the baggage, either at the quarantine or at the port of destination, to relieve himself from his liability as carrier. In a case where it appeared that the plaintiff, being ill, left the vessel at quarantine, his baggage remaining on board the vessel, which reached its destination, the court held that in the absence of any offer on the defendants' part to deliver the baggage at the quarantine, they were bound to deliver it at the end of the journey when called for.²

Of course, a delivery of the baggage to the passenger's authorized agent is equivalent to a delivery to the passenger himself. The question of agency, in such a case, is a question of fact. This will be illustrated by the facts of the following case: By virtue of an agreement between a railroad and a steamboat company, the baggage-master of the latter always entered the cars before their arrival at the depot, and took the checks of through-passengers by the boat, giving them in exchange checks of the steamboat company. It was a controverted question whether he was the plaintiff's agent to receive the baggage, or the railroad company's agent by agreement with the steamboat company to take charge of the baggage and deliver it at the boat; therefore a charge which in effect assumed that he was the plaintiff's agent was held to be an invasion of the province of the jury.³

The contract of the carrier is to deliver at the end of the journey, and if the baggage of a passenger on a railroad is carried past his destination to another station of the road, and there stored in the company's depot baggage-room, the liability of the company as a common carrier is not thereby ended. The company will be liable for the theft of the goods while so stored.⁴

¹ *Klein v. Hamburg American Packet Co.*, 3 Daly, 390.

² *Gilhooly v. New York etc. Steam Nav. Co.*, 1 Daly, 197.

³ *Mobile etc. R. Co. v. Hopkins*, 41 Ala. 486.

⁴ *Toledo etc. R. Co. v. Hammond*, 33 Ind. 379.

Notes.

The effect of a delivery of the baggage to the passenger is to end the carrier's extraordinary liability; and therefore a redelivery of the baggage to his agent, not for carriage, but for safe-keeping, for the convenience of the passenger, will render the carrier responsible only as a gratuitous bailee.¹ The burden of showing that the baggage was delivered to the passenger, it appearing that it was once in the custody of the carrier for carriage, is upon the carrier.²

§ 22. **Duty of Carrier to afford Facilities for Delivery and Storage of Baggage at Destination.**—The duty of the carrier to deliver his baggage to the passenger necessarily involves the duty to extend to the passenger facilities for receiving it. It should be placed where he can get at it. In the case of a railway company, the platform of the station is the usual and proper place to keep it until the owner, in the exercise of due diligence, can receive it.³ There should be a baggage-master in attendance to take care of it and receive the checks and deliver it.⁴ The common carrier is under obligations, too, to care for the baggage for a reasonable time after arrival, to enable the passenger to take possession of it.⁵

§ 23. **Duty of the Passenger to remove his Baggage on arrival at Destination.**—On the other hand, there is a reciprocal duty resting upon the passenger to remove his baggage within a reasonable time after reaching his destination, and thus relieve the carrier from further care and responsibility concerning it. After an opportunity to do this has been afforded him, a failure on his part to remove it within a reasonable time will have the effect of relieving the carrier from his extraordinary liability. He becomes liable then as a warehouseman or bailee for hire.⁶ But the new relation of warehouseman does not arise until it appears that the baggage was stored in a safe and secure warehouse. If it is placed in an insecure room, and stolen, the carrier will be liable as a common carrier and not as a warehouseman.⁷ Thus, the baggage of the plaintiff was not claimed upon arrival at its destination, and, after remaining several hours on the

¹ *Minor v. Chicago etc. R. Co.*, 19 Wis. 40.

² *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1; s. c. 44 L. J. (Q. B.) 18; 31 L. T. (N. S.) 430; 23 Week. Rep. 25.

³ *Patscheider v. Great Western R. Co.*, 3 Exch. Div. 153; *Cary v. Cleveland etc. R. Co.*, 29 Barb. 35.

⁴ *Dinianny v. New York etc. R. Co.*, 49 N. Y. 546.

⁵ *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *Gilhooly v. New York etc. Steam Nav. Co.*, 1 Daly, 197; *Patscheider v. Great Western R. Co.*, 3 Exch. Div. 153; *Cary v. Cleveland etc. R. Co.*, 29 Barb. 35; *Curtis v. Delaware etc. R. Co.*, 74 N. Y. 116.

⁶ *Dinianny v. New York etc. R. Co.*, 49 N. Y. 546; *Chicago etc. R. Co. v. Boyce*, 73 Ill. 510; *Roth v. Buffalo etc. R. Co.*, 34 N. Y. 548; *Van Horn v. Kermit*, 4 E. D. Smith, 454; *Louisville etc. R. Co. v. Mahan*, 8 Bush, 184; *Holdridge v. Utica etc. R. Co.*, 56 Barb. 191;

Bartholomew v. St. Louis etc. R. Co., 53 Ill. 227; *Burnell v. New York etc. R. Co.*, 45 N. Y. 184; *Chicago etc. R. Co. v. Fairclough*, 52 Ill. 106; *Mattison v. New York etc. R. Co.*, 57 N. Y. 552; *Mote v. Chicago etc. R. Co.*, 27 Iowa, 22; *Ross v. Missouri etc. R. Co.*, 4 Mo. App. 583; *Penton v. Grand Trunk R. Co.*, 23 Upper Canada Q. B. 367; *Patscheider v. Great Western R. Co.*, 3 Exch. Div. 153. A loose dictum of the New York Supreme Court would seem to warrant the view that a carrier is liable for unclaimed baggage merely as gratuitous bailee. *Jones v. Norwich etc. Transp. Co.*, 50 Barb. 193. Such a doctrine, however, is entirely unsupported by authority.

⁷ *Bartholomew v. St. Louis etc. R. Co.*, 53 Ill. 227; *Chicago etc. R. Co. v. Fairclough*, 52 Ill. 106; *Mattison v. New York etc. R. Co.*, 57 N. Y. 552; *Mote v. Chicago etc. R. Co.*, 27 Iowa, 22.

Duty of Passenger to remove.

platform, was removed by the station-agent into a room, which was the only place for storing baggage connected with the station, but which was not secure for the keeping of such property, the door being so imperfectly fastened as to constitute no bar to any one desiring to enter, and the building being without a watchman. The room having been entered during the night, and the trunk broken open and rifled, the company was held liable for the loss.¹

A bailee for hire, which is the relation which the carrier bears to the traveller under such circumstances, is bound to exercise, for the safe-keeping of the goods in his charge, such due diligence and care as a prudent man, in contemplation of all the circumstances, would exercise towards his own property. He is liable for all losses in consequence of his negligence or that of his servants. A failure on the part of the carrier to deliver the baggage upon demand, is evidence of negligence, and makes a *prima facie* case of liability against him. The burden of accounting for the default lies with the carrier. Thus, the plaintiff purchased a ticket of a railroad company for New York City over their road and a connecting line, and had his baggage checked through to that city. Upon his arrival there, he gave his check to an expressman, with instructions to get his baggage from the depot. The expressman never called for the trunk, and when the plaintiff, two days afterwards, demanded his trunk, it could not be found. The defendants, in pursuance of an agreement with the connecting line, had transferred the baggage to the latter at Albany, and it had been conveyed by them to New York and deposited in their depot. The court held that in the absence of any proof by the defendants, accounting for their failure to deliver the baggage, the plaintiff was entitled to recover for its loss.²

In these cases, what is a reasonable time for the removal of baggage must necessarily depend upon the circumstances of each individual case, and is frequently, to a great extent, a question of fact for the jury; but where the facts are undisputed, it is said to be a question of law, to be determined by the court.³ Where a traveller, upon reaching the end of one of the stages of her journey, not wishing to be troubled with her trunk, intentionally abandoned it to the care of the carrier, without inquiry about it, presentation of her check, or explanation, special arrangement, or notice, for about seventeen hours, while she went about three miles to visit a friend, and during that period the trunk with its contents was accidentally, and without negligence on the part of the carrier, destroyed by fire in a baggage-room on the dock, into which it had been removed by the carrier's employees, the court held that the carrier was not liable for the loss.⁴ In another instance, a vessel arrived in port on Monday; on Tuesday the master and mate requested the passenger to remove his baggage, which he failed to do. Upon the passenger demanding his baggage the following Wednesday, it was found to be missing. The court held that the owners were relieved from their strict liability as carriers.⁵ In a case previously noticed, the passenger was obliged to quit the vessel at quarantine, and his baggage went on to New York City, — his destination. A delay of several days to demand the baggage

¹ Mote v. Chicago etc. R. Co., 27 Iowa, 22.

² Burnell v. New York etc. R. Co., 45 N. Y., 184. See also Chicago etc. R. Co. v. Fairclough, 52 Ill. 106; Bartholomew v. St. Louis etc. R. Co., 53 Ill. 227.

³ Chicago etc. R. Co. v. Boyce, 73 Ill. 510; Roth v. Buffalo etc. R. Co., 34 N. Y. 548.

⁴ Jones v. Norwich etc. Transp. Co., 50 Barb. 193.

⁵ Van Horn v. Kermit, 4 E. D. Smith, 453.

Notes.

was considered insufficient to release the owners of the vessel from liability as carriers.¹

Other courts are less liberal towards the passenger. A Kentucky case is authority for the rule that a passenger arriving at his destination at half-past eight o'clock, P. M., has "no right to prolong the strict and rigid liability of the company as a common carrier by leaving his baggage in the possession of its agent during the night."² In a Canadian case, it appeared that the plaintiff arrived at his destination at three o'clock in the afternoon, and having had his trunks put into the baggage-room, left the station in an omnibus. In the evening about eight o'clock he sent his checks for the trunks, but one of them had disappeared, and the evidence went to show that it had been stolen. It was held that the defendants were not responsible for this loss; that their duty as common carriers ended when the trunk was placed on the platform and the plaintiff had had a reasonable time to remove it, as he clearly had here.³

A statute forbidding the doing of any secular work or travelling on the Lord's Day will not excuse a passenger who arrives at his destination on Sunday morning from demanding and receiving his baggage.⁴

Circumstances will sometimes excuse a failure of the passenger to claim and remove his baggage. Where the passenger was a lame boy, and unable to take charge of his baggage personally, and made an arrangement with the agent of the carrier by which it was to remain in his hands until sent for, and while so in his hands it was lost, the court held the carrier liable for the loss.⁵

§ 24. Delivery of Baggage upon Forged Order.—As before stated, the responsibility of a carrier of passengers for the safety of baggage is absolute, except as against the act of God and the public enemy. With these exceptions, nothing short of a redelivery to the passenger or his authorized agent, or default in demanding it, will relieve him from this responsibility. Therefore a delivery of a passenger's baggage to a person not authorized to receive it, upon a forged order, whereby it is lost to the owner, will not relieve the carrier of liability, though made in good faith.⁶

§ 25. Measure of Damages in Action for Loss of Baggage.—In an action by a passenger against a carrier for the loss of his baggage, the proper measure of the plaintiff's recovery is the fair market value of his property.⁷ This must be ascertained by the jury, and based upon some evidence. Thus, where the property lost was some valuable laces, and it appeared that they had been purchased by no one within living memory, but were inherited or received by gift, it was

¹ *Gilhooly v. New York etc. Steam Nav. Co.*, 1 Daly, 197.

² *Louisville etc. R. Co. v. Mahan*, 8 Bush, 184. Compare *Cary v. Cleveland etc. R. Co.*, 29 Barb. 35.

³ *Penton v. Grand Trunk R. Co.*, 28 Upper Canada Q. B. 367.

⁴ *Jones v. Norwich etc. Transp. Co.*, 50 Barb. 193.

⁵ *Curtis v. Avon etc. R. Co.*, 49 Barb. 148. See *Harlow v. Fitchburg R. Co.*, 8 Gray, 237.

⁶ *Powell v. Myers*, 26 Wend. 591; *Mattison v. New York etc. R. Co.*, 57 N. Y. 552; s. c. 19 Alb. L. J. 359; 8 Reporter, 440; *Blossman v. Hooper*, 16 La. An. 160; *Morris v. Third Avenue R. Co.*, 1 Daly, 202.

⁷ *Fraloff v. New York etc. R. Co.*, 10 Blatchf. 16; *Illinois etc. R. Co. v. Copeland*, 24 Ill. 332; *Anderson v. North-Eastern R. Co.*, 4 L. T. (N. S.) 216; s. c. 9 Week. Rep. 519; *New Orleans etc. R. Co. v. Moore*, 40 Miss. 39.

 Procedure — Parties to Actions.

held, nevertheless, that their value must be ascertained by a money standard based on evidence, and could not be assessed upon conjecture, and that in the absence of such evidence nominal damages only could be given.¹ But in an early case in Illinois, where the plaintiff, though permitted to prove the loss and contents of his baggage, was not allowed to testify as to the value, the court held that the jury might assess his damages from their own knowledge of the values of such articles, when they have heard them described.²

The plaintiff cannot recover as damages for the loss of his baggage the expense incurred in making search for it;³ nor the amount spent in purchasing clothing and other articles of immediate necessity, in consequence of the loss of his baggage.⁴ Nor can damages be recovered to compensate the passenger for a loss of profits which he expected in any way to derive from the contents of his trunk, and for two reasons: (1) such articles are not baggage;⁵ and (2) such profits constitute speculative or remote damages.⁶

The question as to whether the plaintiff can recover interest on the amount of damages up to the date of judgment is one which belongs properly to a work on damages, and a discussion of the principles governing interest on unliquidated damages is apart from our purpose here. It is sufficient to say that the rule which formerly prohibited the recovery of such interest has been very much modified by the later decisions; and in Iowa it has been held that, in an action for the loss of baggage, the measure of damages properly included interest on the value of the property from the date of the loss to the recovery.⁷

There is a statute in this State which provides, "That for every day's detention to travellers in consequence of damage as before described, and necessary delay in suit for same, said companies, owners, or agents shall pay to each person so delayed a sum of not less than three dollars, which amount shall be added to the judgment for damages to property, should the action be sustained."⁸ This was held to apply to the delay caused by damage or injury to the baggage only, and not to that consequent upon a detention of the same, or a failure to deliver it.⁹

§ 26. **Procedure — Parties to Action.** — A father is the proper plaintiff in an action for the loss of the baggage of his minor child.¹⁰ In Indiana, however, it was held that a minor might himself maintain an action, by his next friend, for the loss of his baggage containing clothing or other property given to him by his parents or others.¹¹

As to the baggage of a married woman, containing her paraphernalia, the rule at common law would seem to be that the husband was the proper plaintiff in an action for its loss, because at common law the property in his wife's parapher-

¹ *Fraloff v. New York etc. R. Co.*, 10 Blatchf. 16.

² *Illinois etc. R. Co. v. Copeland*, 24 Ill. 332.

³ *Mississippi etc. R. Co. v. Kennedy*, 41 Miss. 671.

⁴ *New Orleans etc. R. Co. v. Moore*, 40 Miss. 39.

⁵ *Supra*, § 2.

⁶ *Michigan etc. R. Co. v. Oehm*, 56 Ill. 293; *Brock v. Gale*, 14 Fla. 523.

⁷ *Mote v. Chicago etc. R. Co.*, 27 Iowa, 22.

⁸ Acts 13th Gen. Ass. Iowa, chap. 165, § 2; Amended Code 1873, § 2183.

⁹ *Anderson v. Toledo etc. R. Co.*, 32 Iowa, 86.

¹⁰ *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402; *Grant v. Newton*, 1 E. D. Smith, 95; *Sloman v. Great Western R. Co.*, 67 N. Y. 203.

¹¹ *Perkins v. Wright*, 37 Ind. 29.

Notes.

nalía was vested in him.¹ But in New York the wife's paraphernalia is made a legal separate estate by statute, and she is authorized to sue and be sued for contracts and injuries concerning it;² and therefore a suit for the loss of her baggage is properly brought in her own name.³

In the same State it has been held that the right of action against a common carrier to recover the value of property intrusted to him is assignable. In such a case it is proper for the assignee to sue in his own name.⁴

§ 27. **Pleading—Form of Action.**—The action for the recovery of damages for the loss of baggage may be brought either in the form of an action *ex contractu* for a breach of the contract of carriage, or in the form of an action *ex delicto* for the conversion of the property.⁵ But whatever form is adopted, once selected, it carries with it all the incidents to the action. Thus, in an English case, where the declaration was in form *ex contractu*, a statute depriving the plaintiff of costs in an action founded on contract, in the event of recovering less than £20,⁶ was held to apply and prevent the recovery of costs, though the complaint might have been framed as sounding in tort.⁷ And in Pennsylvania, where the process of *foreign attachment* will not lie upon a demand founded in tort, the court held that it would not lie against common carriers to recover for the loss of a trunk, where the form of the declaration is in tort and not *ex contractu*.⁸

§ 28. **Competency of Plaintiff to show the Contents of Baggage.**—Before the changes effected by the codes of procedure which have been enacted in almost all of the States, the question of the competency of the plaintiff as a witness to show the contents of his baggage was one of considerable importance, and there are many adjudications upon the subject. As is well known, at common law a party was not permitted to testify in his own behalf; but in the case of an action for the loss of baggage, it is frequently impossible for any other person to prove the contents of it, and hence it was repeatedly held that the plaintiff was a competent witness in that respect *ex necessitate rei*.⁹ This rule was extended, not only to an enumeration of the articles, but to the proof of their value.¹⁰ But in Illinois the court confined the plaintiff's testimony to an enumeration of the articles contained in his baggage.¹¹

¹ McCormick v. Penn. etc. R. Co., 49 N. Y. 304.

² Acts N. Y. 1860, chap. 40; Amended Acts N. Y. 1862, chap. 170; 4 N. Y. Stats. at Large (2d ed.), 515-517; 3 Rev. Stats. N. Y., 159-162.

³ Rawson v. Pennsylvania R. Co., 48 N. Y. 212; s. c. 2 Abb. Pr. (N. s.) 220; Stoneman v. Erie R. Co., 52 N. Y. 429; Steamboat State of New York, 7 Ben. 450.

⁴ Merrill v. Grinnell, 30 N. Y. 594; Freeman v. Newton, 3 E. D. Smith, 246.

⁵ Weed v. Saratoga etc. R. Co., 19 Wend. 534; Porter v. Hildebrand, 14 Pa. St. 129; Bayliss v. Lintott, L. R. 8 C. P. 345; s. c. 42 L. J. (C. P.) 119; 28 L. T. (N. s.) 666.

⁶ County Courts Act, 30 & 31 Vict., c. 142, § 5.

⁷ Bayliss v. Lintott, L. R. 8 C. P. 345; s. c. 42 L. J. (C. P.) 119; 28 L. T. (N. s.) 666.

⁸ Porter v. Hildebrand, 14 Pa. St. 129.

⁹ Herman v. Drinkwater, 1 Me. 27; Whitesell v. Crane, 8 Watts & S. 369; Illinois etc. R. Co. v. Copeland, 24 Ill. 332; Dibble v. Brown, 12 Ga. 217; Doyle v. Kiser, 6 Ind. 243; Garvey v. Camden etc. R. Co., 1 Hilt. 280; Bingham v. Rogers, 6 Watts & S. 495; Cadwallader v. Grand Trunk R. Co., 9 Lower Canada Rep. 169; Macdougall v. Torrance, 4 Lower Canada Jur. 132. But see David v. Moore, 2 Watts & S. 230; Snow v. Eastern R. Co., 12 Met. 44.

¹⁰ Whitesell v. Crane, *supra*; Bingham v. Rogers, *supra*; Mad River etc. R. Co. v. Fulton, 20 Ohio, 318.

¹¹ Illinois etc. R. Co. v. Copeland, 24 Ill. 332; Illinois etc. R. Co. v. Taylor, 24 Ill. 323; Davis v. Michigan etc. R. Co., 22 Ill. 278.

 Burden of Proof—*Res Gestæ*.

On the same principle, the rule which incapacitated the husband or wife as a witness for each other was relaxed in these cases.¹ But these relaxations of the strict rule of the common law were not favored by the courts, and it was only in those instances where no other evidence was attainable that they were permitted.² This stringency in enforcing the rule was extended to those cases where an assignment of the claim had been made and it appeared that the assignment was colorable merely, made for the purpose of enabling the owner of the baggage to testify to its contents, and that the action was prosecuted really for his benefit. The testimony of such an assignor was admitted only under the same restrictions which would have been imposed had he been the plaintiff.³

So great was the inconvenience and injustice of the common-law rule, even as relaxed in practice, that in several of the States statutes were enacted enabling the plaintiff to testify in such cases.⁴

§ 29. *Burden of Proof*.—The contract of the carrier is, to carry the baggage, and at the end of the journey to deliver it safely into the hands of the passenger. It is therefore enough for the passenger, in an action for its loss, to show delivery to the carrier, and a failure to redeliver at the end of the journey. The burden of showing that the loss occurred under circumstances which will excuse the carrier for default rests upon the latter.⁵ But such is not the rule where the carrier, from the circumstances of the case, is liable only as a gratuitous bailee. In such a case the plaintiff must prove negligence. Thus, the defendant, a railroad company, failed to deliver to a connecting line a passenger's valise containing *merchandise only*. Such a failure was not evidence to charge the defendant with negligence, who had sold the ticket and checked the baggage over both lines.⁶

§ 30. *Res Gestæ*.—An agent of a railroad corporation, having charge of a depot, is a proper person to inquire of respecting lost baggage, and his answer is part of the evidence of the loss, and admissible as *res gestæ*.⁷

¹ *McGill v. Rowand*, 3 Pa. St. 451; *Smith v. Boston etc. R. R.*, 44 N. H. 325.

² *Dibble v. Brown*, 12 Ga. 217.

³ *Bell v. Drew*, 4 E. D. Smith, 59.

⁴ *Stats. Mass.* 1851, chap. 147, § 5; *Harlow v. Fitchburg R. Co.*, 8 Gray, 237; *Rev. Stat. Mo.* 1855, p. 435, § 45; *Nolan v. Ohio etc. R. Co.*, 39 Mo. 114; *Laws N. Y.* 1850, p. 232; 2 *Rev. Stats. N. Y.* 540, § 54.

⁵ *Camden etc. R. Co. v. Baldauf*, 16 Pa. St.

67; *Van Horn v. Kermit*, 4 E. D. Smith, 453; *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402; *Burnell v. New York etc. R. Co.*, 45 N. Y. 184; *Garvey v. Camden etc. R. Co.*, 1 Hilt. 280; *Steamboat State of New York*, 7 Ben. 450.

⁶ *Stimson v. Connecticut River R. Co.*, 98 Mass. 83. But see *Steers v. Liverpool etc. Steam Co.*, 57 N. Y. 1.

⁷ *Curtis v. Avon etc. R. Co.*, 49 Barb. 148; *Morse v. Connecticut etc. R. Co.*, 6 Gray, 450.

CHAPTER XVII.

REMEDIES, PROCEDURE, AND DAMAGES.

LEADING CASE: *McCall v. Forsyth*. — Action may be *ex contractu* or *ex delicto*.

- NOTES: § 1. Jurisdiction of suits against carriers.
2. Carrier may be sued in contract or tort.
 3. Form of the action — Trespass or case.
 4. Joint and several liability.
 5. Difference in measure of damages between actions *ex contractu* and actions *ex delicto*.
 6. Abatement and revival.
 7. Who may sue.
 - (1.) Master or parent for loss of service of servant or child.
 - (2.) Foreign administrator.
 - (3.) Husband for wife.
 - (4.) Wife in her own name.
 - (5.) Assignee of the cause of action.
 8. Counts in the declaration.
 9. Particularity of statement in the declaration or complaint.
 - (1.) In actions *ex delicto*.
 - (2.) In actions *ex contractu*.
 10. Allegations under statutes giving a right of action where the damages resulted in death.
 11. Allegation of the carrier's duty.
 12. Allegation of damages.
 13. Whether the plaintiff must deny contributory negligence.
 14. Particularity of statement in the defensive pleadings.
 15. Variance between allegation and proof.
 16. Points of evidence.
 - (1.) Presumptions.
 - (2.) Want of skill in the carrier's servant.
 - (3.) *Res gestæ*.
 - (a.) Declarations of the plaintiff.
 - (b.) Conduct of the other passengers.
 - (c.) Conduct of the defendant.
 - (d.) Statements of the defendant's servants.
 - (4.) Testimony of expert witnesses.
 - (5.) Opinions of non-expert witnesses.
 - (6.) Other matters.
 17. Province of court and jury.
 18. Demurrer to evidence.
 19. All damages, present and prospective, may be recovered.
 20. Permanent injuries — Life-tables.
 21. Damages should be obvious, and not conjectural or speculative.

Supreme Court of Pennsylvania.

- NOTES: § 22. The same rules as to the measure of damages apply to corporations as to individuals.
23. Elements of damage.
24. Continued — Wealth of defendant — Circumstances of plaintiff — Disfigurement of person — Character of plaintiff — Expense of litigation — Value of gratuitous nursing.
25. Continued — Damages which may be recovered by husband and wife jointly suing — Recovery by father for injury to child.
26. Mitigation of damages.
27. Exemplary damages.
- (1.) May be awarded, when.
- (2.) When corporations are liable.
- (3.) Questions of law and questions of fact.
28. Excessive damages — When appellate courts will reverse judgments on account of.
29. Illustrations.
- (1.) For wrongfully ejecting passenger.
- (2.) For removal of a passenger from a train at a place not a regular station.
- (3.) For refusal to admit passenger to a car — Colored person.
- (4.) For assault upon passenger by carrier's servants.
- (5.) For carrying passenger beyond his destination.
- (6.) For injury to passenger in railroad accident.
- (7.) For injury to passenger getting on or off a railroad train.
- (8.) For injury to passenger by accident to stage-coach.

ACTION MAY BE EX CONTRACTU OR EX DELICTO.

McCALL v. FORSYTH.*

*Supreme Court of Pennsylvania, 1842.*Hon. JOHN BANNISTER GIBSON, *Chief Justice.*

" CHARLES HUSTON,	} <i>Justices</i>
" JOHN KENNEDY,	
" THOMAS SERGEANT,	
" MOLTON C. ROGERS,	

For the injury done to a passenger by the negligence of the carrier, he may sue either in *assumpsit* or in case; if in the former, in order to recover he must prove the liability of all the parties sued; if in the latter, he may recover against those of the defendants who are liable.

ERROR to the District Court of Allegheny County. John Forsyth brought this action on the case against William McCall, Abraham Hor-

* Reported, 4 Watts & S. 179.

McCall v. Forsyth.

bach, Samuel Reisher, James Spratt, and Samuel Elder, to recover damages for an injury done to him by the upsetting of the defendants' stage. McCall and Horbach were alone served with process, and for them alone was there any appearance or plea.

The defendants took the ground that the plaintiff could not recover unless he proved that all the defendants sued were partners, or part-owners of the stage in which the plaintiff received the injury alleged in his declaration.

GRIER, President, instructed the jury that the plaintiff's position was not untenable; and the jury rendered a verdict for the plaintiff for \$500 damages.

Dunlop, for plaintiff in error. — The point raised has been differently decided in England. In the Common Pleas,¹ it was held to be an action *ex contractu*; but this was reversed in the King's Bench and Exchequer.² In Pennsylvania, the doctrine of the Common Pleas has been recognized and expressly sanctioned.³ The leading cases on the subject are found in 2 Show. 478; 3 Lev. 258.

It was originally called an action of *assumpsit*, though in form a suit on the custom of the realm, and it was held could not be joined with *trover*.⁴ Lord ELLENBOROUGH required parties to be joined in an action of deceit in a warranty by two.⁵ It is also worthy of consideration that if the doctrine of the court below be sustained, it leads to the result that the whole burden of the misfortune may be thrown upon one of the owners, without the right to resort to the others for contribution.⁶

Findlay, contra. — The principle seems to be clearly recognized that the party may elect to sue on the contract, or charge the defendants in an action on the case sounding in tort; and there is no reason why he should be deprived of this election. The cases cited on the other side are those of non-feasance, whereas this is a case of misfeasance; and this distinction is taken by KENNEDY, J., in 7 Watts, 79. We think the point is clearly settled in England by the highest tribunals.⁷

The opinion of the court was delivered by —

ROGERS, J. — We affirm this judgment, on the authority of the cases of *Bretherton and others*,⁸ *Ansell v. Waterhouse*,⁹ and *Bank of Orange*

¹ *Powell v. Layton*, 5 Bos. & Pul. 365; *Max v. Roberts*, 5 Bos. & Pul. 454.

² *Max v. Roberts*, 12 East, 89; *Govett v. Radnidge*, 3 East, 62.

³ *Wilt v. Welsh*, 6 Watts, 9; *Hunt v. Wynn*, 6 Watts, 47; *McCahan v. Hirst*, 7 Watts, 175.

⁴ 1 Salk 100.

⁵ *Beall v. King*, 12 East, 452.

⁶ *Merryweather v. Nixan*, 8 Term Rep. 186.

⁷ 7 Eng. Com. Law Rep. 343; *Ansell v. Waterhouse*, 2 Chit. 1. See also *Bank of Orange v. Brown*, 3 Wend. 158; *Zell v. Arnold*, 2 Pa. 295.

⁸ *Bretherton v. Wood*, 7 Eng. Com. Law Rep. 343; 3 Brod. & B. 54.

⁹ *Ansell v. Waterhouse*, 18 Eng. Com. Law Rep. 227; 2 Chit. 1.

Notes.

v. Brown,¹ to which may be added *Zell v. Arnold*.² Justice SAVAGE, in *Bank of Orange v. Brown*,³ reviews all the authorities which bear on the question, and comes to the conclusion (in which we concur) that the true rule is, that an action solely on the custom is an action of tort; that the plaintiff has his choice of remedies, either to bring *assumpsit* or case; and that when one or other form of action is adopted, it must be governed by its own rules; that an action against a common carrier upon the custom is founded on a breach of duty, — that it is a tort or misfeasance. The declaration here is for a tort or misfeasance *ex delicto*, and not in contract; the plea, not guilty; and from this follows that the action is joint or several, and as a necessary consequence a recovery may be had of one for an injury done by two or more of the joint tort-feasors.

There was, therefore, no error in ruling that it was unnecessary to prove that all the defendants were partners, because they were jointly and severally liable for tort or misfeasance charged in the declaration.

Judgment affirmed.

NOTES.

§ 1. **Jurisdiction of Suits against Carriers.** — It has been held by the Court of Appeals of Virginia that a railroad corporation chartered in another State, by the act of leasing a railroad situated in Virginia, makes itself, *quoad hoc*, a Virginia corporation, so that, when sued in the courts of Virginia, it is not entitled to remove the suit to the United States Circuit Court;⁴ but, notwithstanding the respect which is due to the judgments of this court, we think, in view of decisions of the Supreme Court of the United States upon analogous questions, this question must still be considered as open. The Supreme Court of Indiana holds that that State has concurrent jurisdiction with the State of Kentucky over torts committed on the Ohio River, and that the Indiana statute giving damages where the death of a person is caused by the wrongful act or omission of another extends to suits against a carrier for the killing of a passenger on the Ohio River between the States of Indiana and Kentucky.⁵ The Court of Appeals of New York has held that the Supreme Court of that State has jurisdiction of an action against the owners of a steamboat navigating the waters of Lake Champlain for causing the death of a passenger by negligence, while such passenger was on their boat plying between points within the State of New York.⁶

¹ *Bank of Orange v. Brown*, 3 Wend. 158.

² *Zell v. Arnold*, 2 Pa. 297.

³ *Bank of Orange v. Brown*, 3 Wend. 158.

⁴ *Baltimore etc. R. Co. v. Wightman*, 29 Gratt. 431 (citing *Baltimore etc. R. Co. v. Gallahue*, 12 Gratt. 655; *Railroad Co. v. Harris*, 12 Wall. 65; *Maryland v. Northern etc. R. Co.*, 18 Md. 193; *Sprague v. Hartford etc.*

R. Co., 5 R. I. 233; *Goshen v. Supervisors*, 1 W. Va. 308; *Pennsylvania R. Co. v. Sly*, 65 Pa. St. 205; *Pomeroy v. New York etc. R. Co.*, 4 Blatchf. 122).

⁵ *Sherlock v. Alling*, 44 Ind. 184.

⁶ *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1.

Notes.

In New York, where the action is for the loss of baggage, it is not necessary to aver that the plaintiff was without fault.¹

An action may be brought *in rem* against a vessel for the death of a person, caused by the negligence of the officers of such vessel.² Statutes giving an action where the injury resulted in death, although applicable to marine torts, do not infringe the jurisdiction of the Federal courts; nor do they infringe the commercial power of Congress.³ Where a statute⁴ giving an action for the death of a person, caused by a wrongful act, also provides "that such action shall be brought for a death caused in this State, and in some court established by the Constitution and laws of the same," it does not prevent the removal of the action to the Federal court and maintaining it there by a non-resident plaintiff, under the act of Congress of March 2, 1867.⁵

§ 2. **Carrier may be sued in Contract or Tort.**—Declarations against carriers in tort are as old as the law, and continued till *Dale v. Hall*,⁶ when the practice of declaring in *assumpsit* succeeded; but this practice does not supersede the other.⁷ When the relation of carrier and passenger is once formed, the law steps in and annexes to the carrier certain duties, for the non-performance of which the passenger may bring an action of tort; and this is the kind of action which is usually brought when the passenger is injured through the negligence of the carrier or his servants, or through violence and force used by either.⁸ Whilst there has never been any doubt that the injured passenger may bring an action of tort, it is equally clear that he may, if he chooses, waive the tort and sue in *assumpsit*;⁹ and accordingly as the action is in contract or tort, the incidents of each form of action attach. In States which practice under codes by which the common-law forms of action are abolished, whether such an action is to be deemed an action *ex contractu* or *ex delicto* is to be determined by the nature of the grievance rather than by the form of the declaration; and where the breach of duty was a failure to put the passenger off at the proper station, it was treated as an action for a tort, so that exemplary damages might

¹ *Richards v. Westcott*, 2 Bosw. 589.

² *The City of Brussels*, 6 Ben. 370. See also *Ryall v. Kennedy*, 8 Jones & Sp. 347; *Plummer v. Webb*, 1 Ware, 75; *Boutiller v. Milwaukee*, 8 Minn. 97; *Glaholm v. Barker*, L. R. 1 Ch. App. 223; s. c. L. R. 2 Eq. 598; *Smith v. Brown*, L. R. 6 Q. B. 729.

³ *Steamboat Co. v. Chase*, 16 Wall. 522; *Sherlock v. Alling*, 93 U. S. 99 (affirming s. c. 44 Ind. 184).

⁴ Rev. Stats. Wis. 1878, p. 1020, § 4255.

⁵ *Railway Co. v. Whitton*, 13 Wall. 270. But see *Whitton v. Chicago etc. R. Co.*, 25 Wis. 424.

⁶ 1 Wils. 231.

⁷ *Bayley, J.*, in *Ansell v. Waterhouse*, 2 Chit. 1; s. c. 6 Mau. & Sel. 385.

⁸ *Ansell v. Waterhouse*, *supra*; *Bretherton v. Wood*, 6 J. B. Moo. 141; s. c. 3 Brod. & B. 54; *Bank of Orange v. Brown*, 9 Wend.

158; *McCall v. Forsyth*, 4 Watts & S. 179; *Pennsylvania R. Co. v. The People*, 31 Ohio St. 537; *Heirn v. McCaughan*, 32 Miss. 17; *Cregin v. Brooklin etc. R. Co.*, 75 N. Y. 192; *Saltonstall v. Stockton*, Taney's Dec. 11; *Frink v. Potter*, 17 Ill. 406; *New Orleans etc. R. Co. v. Hurst*, 36 Miss. 660; *Ames v. Union R. Co.*, 117 Mass. 541. An action, under the practice in Ohio, against a foreign corporation for a personal injury was held to be in contract, within the meaning of that section of the code which permits attachments to issue in aid of suits where the claim is a debt or demand arising upon a contract, judgment, or decree. *Pennsylvania R. Co. v. The People*, 31 Ohio St. 537. Compare *Sawyer v. Dulaney*, 30 Texas, 479.

⁹ *Taney, C. J.*, in *Saltonstall v. Stockton*, Taney's Dec. 11; *Frink v. Potter*, 17 Ill. 406, 411.

Joint and Several Liability.

be awarded.¹ Accordingly, such an action has been held not the less an action for a tort because it demanded judgment for a specific sum of money.²

The *gravamen* of such an action being a breach of a public duty, privity of contract is not necessary to support it; persons may sue who are on the carrier's vehicle by license merely;³ and so may a mail-agent, who has no contract directly with the carrier.⁴

§ 3. **Form of the Action — Trespass or Case.**—Where the common-law forms of action obtain, the remedy is generally case, and not trespass;⁵ but it is well settled that an action of trespass will lie against a corporation,⁶ and such actions are frequently sustained against incorporated carriers for trespasses of their servants.⁷

§ 4. **Joint and Several Liability.**—When it is understood that the action may be in tort, all the consequences of such an action follow. Where a person is injured by the joint wrong of several persons, he is under no obligation to join all of them in his suit, but he may bring his action against any one whom he may catch. It is therefore not a good plea in abatement to such an action that the carrier was one of a partnership firm and that his copartners are not joined as defendants.⁸ This rule applies where the suit is against the carrier for the loss of goods, as well as where it is for an injury to a passenger.⁹ Thus, where an action was against the master and unknown owners of a steamship for the value of a lost trunk, and the master alone answered, and it did not appear that a citation had been issued for the owners, the plaintiff was allowed to enter a *nolle prosequi* as to the parties not served.¹⁰ So, where a person in one train is injured by a collision between the train in which he is and another train, belonging to another carrier, he may sue both companies together, or either of them separately.¹¹ For the same reason, if several are jointly sued, a verdict in favor of part of them is good.¹²

§ 5. **Difference in Measure of Damages between Actions Ex Contractu and Actions Ex Delicto.**—There is another light in which the question whether the action is in contract or in tort assumes importance. If the action is for the breach of a contract merely, the plaintiff cannot recover damages for disappoint-

¹ *New Orleans etc. R. Co. v. Hurst*, 38 Miss. 660.

² *Hammond v. North-Eastern R. Co.*, 6 So. Car. 130. For an example of declarations where the action was held founded upon a contract, see *Bayliss v. Lintott*, L. R. 8 C. P. 345; *s. c.* 42 L. J. (C. P.) 119; 28 L. T. (N. S.) 666.

³ *Ante*, p. 44.

⁴ *Hammond v. North-Eastern R. Co.*, 6 So. Car. 130; *Nolton v. Western R. Corp.*, *ante*, p. 37.

⁵ *Havens v. Hartford etc. R. Co.*, 28 Conn. 69.

⁶ *Sabin v. Vermont etc. R. Co.*, 25 Vt. 363; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; *s. c.* 15 Jur. 297; 20 L. J. (Exch.) 196.

⁷ *St. Louis etc. R. Co. v. Dalby*, 19 Ill. 353.

⁸ *Ansell v. Waterhouse*, 2 Chit. 1; *s. c.* 6 Mau. & Sel. 385; *Stockton v. Frey*, 4 Gill, 406; *McCall v. Forsyth*, 4 Watts & S. 179, *ante*, p. 541.

⁹ *Bank of Orange v. Brown*, 3 Wend. 158.

¹⁰ *Forbes v. Davis*, 18 Texas, 268.

¹¹ *Colegrove v. New York etc. R. Co.*, 6 Duer, 382. It was held that even if it was a misjoinder to sue both companies together, yet it was cured by answering and omitting to demur. *Ibid.*

¹² *Bretherton v. Wood*, 6 J. B. Moo. 141; *s. c.* 3 Brod. & B. 54; 9 Price, 408; *Gunn v. Dickson*, 10 Upper Canada Q. B. 461; *Frink v. Potter*, 17 Ill. 406, 411.

Notes.

ment, sense of wrong, and injury to the feelings. Thus, where the complaint was that the defendant agreed with the plaintiff and a large number of others to convey them to a certain place where a religious meeting was held on Sunday, and to bring them back at a certain appointed time, and that the defendant failed so to bring them back, it was held that this was a suit on a special contract, for the reason that the defendant was under no legal duty as a public carrier to carry passengers on Sunday; and it being on a special contract, damage for injured feelings could not be recovered.¹ Nor can exemplary damages be recovered where the action is on the contract,² the rule being that, "in actions for breaches of contract, damages must be such as are capable of being estimated or appreciated."³ But where the action is for a tort, founded on a breach of a public duty, exemplary damages may be given.⁴

§ 6. **Abatement and Revival.**—Although such an action is in tort, it does not abate by the death of the plaintiff—where the husband sues for the loss of the services of his wife—under the Revised Statutes of New York.⁵ Where a child died on a voyage from Liverpool to New York, in consequence of the negligence of the officers of the ship, as was alleged, it was held, in the United States District Court, that an action against the carrier by the father was an action in contract; that it hence survived to him as administrator, and might be sued for *in rem*.⁶

§ 7. **Who may sue.**—(1.) *Master or Parent, for Loss of Service of Servant or Child.*—Where the action is on a contract to carry, it can only be brought by one who was a party to the contract, and who has been injured by a breach of it. An action *ex contractu* will not, therefore, lie against a carrier in favor of the master for an injury to his servant whereby he loses the benefit of his services, where the contract to carry was between the carrier and the servant.⁷ For the same reason, a widowed mother cannot sue for an injury done to her minor child by a carrier while carrying him.⁸ These cases cannot be supported on principle. When it is conceded that the foundation of the action against the carrier for an injury to his passenger is a tort, and that the injury does not necessarily consist in the breach of the contract,⁹ it seems logically to follow that privity of contract is not necessary to support such an action, and that any one who has sustained direct damage by the carrier's breach of duty may sue, provided the carrier owed the duty to him; and this is the view taken by the Supreme Judicial Court of Massachusetts, which holds that a master may, in such a case, maintain an action against the carrier for an injury to his apprentice *quod servitium amisit*.¹⁰ Circumstances may, it is supposed, exist where the contract for

¹ Walsh v. Chicago etc. R. Co., 42 Wis. 23.

² New Orleans etc. R. Co. v. Hurst, 36 Miss. 660.

³ Pollock, C. B., in Hamlin v. Great Northern R. Co., 1 Hurl. & N. 408, 411.

⁴ Heirn v. McCaughan, 32 Miss. 17, *infra*, § 27.

⁵ 2 Rev. Stats. N. Y. 447, §§ 1, 2; Cregin v. Brooklyn etc. R. Co., 75 N. Y. 192 (distinguishing Wade v. Kalbfleisch, 58 N. Y. 282).

⁶ The City of Brussels, 6 Ben. 370.

⁷ Alton v. Midland R. Co., 19 C. B. (N. S.) 213; Fairmount etc. R. Co. v. Stutler, 54 Pa. St. 375.

⁸ Fairmount etc. R. Co. v. Stutler, *supra*. Compare Kennard v. Burton, 25 Me. 39; s. c. 1 Thomp. on Neg., p. 368.

⁹ *Supra*, § 1.

¹⁰ Ames v. Union R. Co., 117 Mass. 541 citing 1 Chit. Pl. (3 Am. ed.) 47; Reeve's) Dom. Rel. 376; Bac. Abr., tit. "Master and Servant," O; McCarthy v. Guild, 12 Mete.

Particularity of Statement.

the carriage of the servant is between the master, or parent, and the carrier, in which case, in either view of the question, the right of action would be in the master or parent.

(2.) *Foreign Administrator*. — Whether an action for the death of a passenger can be brought by a foreign administrator is a question of local policy, which must be answered by the statutes and decisions of each State. The general rule is that no suit can be maintained by an administrator or executor in any other country except that from which he derives his authority.¹ In Indiana such an action may be brought, and the right of action in such a case can only be questioned by a plea under oath.² In Georgia, a foreign administrator could sue where the intestate departed this life out of the State.³

(3.) *Husband for Wife*. — In Massachusetts, a passenger who, having a free pass for himself, bought a ticket for his wife, and delivered to the carrier her trunk without informing him that it was not his, could maintain an action in his own name for the loss of the trunk;⁴ but the case is not very clear.

(4.) *Wife in her own Name*. — In New York, a wife may sue a carrier in her own name for the loss of baggage consisting of her wardrobe;⁵ and the same rule has been applied in a suit in admiralty.⁶

(5.) *Assignee of the Cause of Action*. — In New York it has been held that the claim of a passenger against a carrier for the loss of baggage may be assigned, and that the assignee may bring suit thereon in his own name.⁷

§ 8. *Counts in the Declaration*. — In Massachusetts — and this is supposed to be the general rule where the old system of pleading prevails — the plaintiff may set forth his cause of action in different ways, in different counts of his declaration. Thus, he may charge in one count that the defendant ran over him while he was in the roadway; in another, that the defendant committed an assault and battery upon him; and in another, that he was a passenger upon the defendant's car, riding upon the platform thereof, and that the driver wrongfully and carelessly compelled him to jump therefrom without checking its speed, whereby he was injured, etc.⁸

§ 9. *Particularity of Statement in the Declaration or Complaint*. — (1.) *In Actions Ex Delicto*. — When an accident happens in consequence of the failure or breaking down of the carrier's means of transportation, it is impossible in many cases for the passenger to know just how the accident was brought about; and

291; *Dennis v. Clark*, 2 Cush. 347; *Rice v. Nickerson*, 9 Allen, 478; *Kennedy v. Shea*, 110 Mass. 147; *Martinez v. Gerber*, 3 Scott's N. R. 386; *s. c.* 3 Man. & G. 88; *Hadsoll v. Stallebrass*, 11 Ad. & E. 301; *Hall v. Hollander*, 4 Barn. & Cress. 660; *Woodward v. Washburn*, 3 Denio, 369. See also 2 Thomp. on Neg., p. 1242.

¹ *South-Western R. Co. v. Paulk*, 24 Ga. 356, citing many authorities.

² *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.

³ *South-Western R. Co. v. Paulk*, 24 Ga. 356; *Cobb's Dig.* Ga. Stats. 341.

⁴ *Malone v. Boston etc. R. Co.*, 12 Gray, 388.

⁵ *Fraloff v. New York etc. R. Co.*, 10 Blatchf. 16; *s. c.* affirmed, *ante*, p. 502; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 216.

⁶ *The State of New York*, 7 Ben. 450. See 2 Thomp. on Neg., p. 1240.

⁷ *Freeman v. Newton*, 3 E. D. Smith, 246.

⁸ *Lovett v. Salem etc. R. Co.*, 9 Allen, 557. See also *Baltimore etc. R. Co. v. Wilkinson*, 30 Md. 224, 230; *Toledo etc. R. Co. v. Daniels*, 21 Ind. 256; *Wright v. Indianapolis etc. R. Co.*, 18 Ind. 168; *Jeffersonville etc. R. Co. v. Vancant*, 40 Ind. 233.

Notes.

the rule being, as already seen, that the fact that such accident happened is *primâ facie* evidence of negligence on the part of the carrier, it is obviously unnecessary for the passenger to allege the particular cause of the accident.¹ In some jurisdictions it is sufficient to allege in general terms that the accident was the result of the carrier's negligence.² But a count alleging in general terms that the plaintiff was in the car of the defendant, and was thrown therefrom by the carelessness of the defendant, is too general in its description of the manner in which the injury was sustained.³ Where the plaintiff was injured by jumping from the defendant's railway car, it was held sufficient to allege that, by reason of the negligence and carelessness of those operating the car, it became dangerous to remain in the car, that the plaintiff's life and limbs were endangered by so remaining, and that in order to get out of such danger and to preserve his life and limbs he was obliged to jump from the car, whereby he was greatly hurt, etc., without alleging the particular circumstances which rendered it unsafe to remain in the car, or how or by what means his life and limbs were endangered.⁴ An allegation that the carrier's vehicle was so negligently provided, fitted out, etc., that it broke down, is sufficient, without stating in what particular respect it was negligently provided, fitted out, etc., or how it broke down.⁵ An allegation that it was the duty of the defendant to use due and proper care in conveying the passenger, and that he did not use due and proper care, has been held a sufficient allegation of a duty and a breach thereof, after verdict, on a motion in arrest of judgment.⁶

In an action against a railway company for an injury to a passenger, it is not necessary to state that the defendants had power by their charter to become common carriers; it will be sufficient to allege that they were owners of the road on which the injury happened; that they were, at the time of the injury, running passenger-trains thereon; and that they agreed, for a certain reasonable reward paid to them, to carry the plaintiff.⁷ A declaration by husband and wife for a personal injury to the wife will not be bad, after verdict, because it alleges that by reason of the injury which she received the plaintiffs were obliged to expend \$200 in effecting her cure. Though a recovery cannot be had in the same action for a personal injury to the wife and for the expenses attending her recovery, yet an allegation touching the latter subject will be regarded as merely descriptive of the extent of the injury, and it will be presumed that the trial court confined the evidence to the only ground of recovery which was the gist of the action, namely, the wife's personal injury.⁸ It is no misjoinder of counts for the declaration to allege in one count that the promise was made to the *wife*, and in another that it was made to the *plaintiffs*, where the language of the latter count showed that the promise was made for the wife's benefit.⁹

An allegation that the price of the ticket was seventy cents; that the plaintiff, in the train, when the ticket or fare was demanded by the conductor, tendered this amount, which was refused; that the conductor, for the purpose of robbing

¹ *Carmanty v. Mexican Gulf Co.*, 5 La. An. 703; *Weed v. Saratoga etc. R. Co.*, 19 Wend. 534.

² *Alleender v. Chicago etc. R. Co.*, 37 Iowa, 264.

³ *Central R. Co. v. Van Horn*, 38 N. J. L. 133.

⁴ *Eldridge v. Long Island R. Co.*, 1 Sandf. S. C. 89.

⁵ *Ware v. Gay*, 11 Pick. 106.

⁶ *Taylor v. Day*, 16 Vt. 566.

⁷ *Fuller v. Naugatuck R. Co.*, 21 Conn. 557.

⁸ *Ibid.*

⁹ *Ibid.*

Under Statutes in Case of Death.

and oppressing him, demanded one dollar and five cents, and, upon his failure to pay it, compelled him to leave the train, makes out a good cause of action on demurrer; for it is not to be presumed, without evidence, that the company made a distinction between ticket-fare and train-fare, and that the one dollar and five cents mentioned in the complaint was the train-fare fixed by the company.¹ In Illinois, the declaration in an action for lost baggage need not aver that the plaintiff was a passenger; this may be proved without an averment, by proof of the fact that a check for the baggage was given by the defendant to the plaintiff.² Where the injury complained of was the wrongful ejection by the conductor of a railway company of the plaintiff from its cars, it was held not necessary to allege or prove that specific authority was conferred by the company upon the conductor to perform such acts, for the court will take cognizance of the duties of conductors as pointed out by the statute.³ Where the complaint shows that the plaintiff was rightfully upon the defendant's railway train as a passenger, and that the servants of the defendant wrongfully struck and threw the plaintiff from the cars, it sufficiently shows that the wrong complained of was committed by the servants of the defendant in their employment of running the train.⁴

(2.) *In Actions Ex Contractu*.—In an action for fare wrongfully demanded and collected from a passenger, it has been held that the plaintiff's declaration or claim must state not merely a claim for so much "money had and received," but he must state that the defendants received the money; that they received it from the plaintiff, and, most important of all, that they received it to the plaintiff's use.⁵

§ 10. *Allegations under Statutes giving a Right of Action where the Damages resulted in Death*.—These statutes and the decisions under them have been considered at large in the author's work on Negligence.⁶ In Illinois, the declaration in an action under such a statute must aver that the railroad on which the injury happened was used by the defendants in the county and State in which the action is brought, or it will be bad on demurrer, though it will be good after verdict.⁷ In Illinois, Indiana, Wisconsin, and New York, it must also state that the deceased left a widow and next of kin, to whom damages can be distributed.⁸ But in Virginia it is not necessary that the declaration state that the deceased left a family, or that the action is prosecuted for their benefit.⁹ It has been held in the United States Circuit Court, by Mr. Justice DAVIS, that it is not necessary¹⁰ that the declaration should contain an express averment

¹ *Avery v. Atchison etc. R. Co.*, 11 Kan. 448.

² *Illinois etc. R. Co. v. Copeland*, 24 Ill. 332.

³ *Travers v. Kansas etc. R. Co.*, 63 Mo. 421; *Wag. Stats. Mo.* 307, § 28.

⁴ *Pittsburgh etc. R. Co. v. Theobald*, 51 Ind. 246 (citing *Evansville etc. R. Co. v. Baum*, 26 Ind. 70; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; *Indianapolis etc. R. Co. v. Anthony*, 43 Ind. 183; *Terre Haute etc. R. Co. v. Graham*, 46 Ind. 239; *Terre Haute etc.*

R. Co. v. Fitzgerald, 47 Ind. 79; *Indianapolis etc. R. Co. v. Hamilton*, 44 Ind. 76.

⁵ *Bennett v. Railroad Co.*, 7 Phila. 11.

⁶ 2 *Thomp. on Neg.*, pp. 1272-1309.

⁷ *Chicago etc. R. Co. v. Morris*, 26 Ill. 400.

⁸ *Chicago etc. R. Co. v. Morris*, *supra*; *Indianapolis etc. R. Co. v. Keely*, 23 Ind. 133; *Woodward v. Chicago etc. R. Co.*, 23 Wis. 400; *Safford v. Drew*, 3 Duer, 627.

⁹ *Baltimore etc. R. Co. v. Wightman*, 29 Gratt. 431, 440.

¹⁰ Under the Illinois statute of February 12, 1853.

Notes.

showing the *manner* in which the next of kin have sustained pecuniary loss. The action can be sustained though the next of kin had no legal claim on the deceased for services or support, the object of the statute being to make carriers more careful of the lives intrusted to their care.¹ This case was affirmed by the Supreme Court of the United States;² but the interpretation there put upon the statute was subsequently denied by the Supreme Court of Illinois.³

§ 11. **Allegation of the Carrier's Duty.**—It has been held, in a case which underwent a learned discussion, that a declaration in *assumpsit* for the loss of a passenger's baggage was not bad because it alleged the duty of the defendant to convey the plaintiff and his baggage "safely and securely." The words "safely and securely" did not necessarily import a more extended duty than that of ordinary care.⁴ So, a declaration against a carrier which alleges that it became his duty to carry the plaintiff *safely*, does not mean safely at all events, but will be supported by proof of a want of due care.⁵

§ 12. **Allegation of Damages.**—Under the common allegation *ad damnum*, only those damages can be recovered which necessarily result from the act complained of, and which are properly termed *general* damages. The reason is, that the defendant must be presumed to be aware of the necessary consequences of his conduct, and therefore cannot be taken by surprise in the proof of them. But damages which do not necessarily flow from the principal fact, though possibly attendant upon it, are denominated *special*. To prevent surprise to the defendant, such damages must be particularly specified in the declaration, or else the plaintiff will not be permitted to give evidence of them. Under the head of general damages may be classed the direct expenses incurred by the plaintiff in consequence of the injury; the loss of his time, the bodily and mental suffering he has endured, and any incurable hurt inflicted; for these may be classed among the necessary results of the injury. But damages arising from the circumstance of the injured passenger being the head of a dependent family are classed as special damages, since they have no necessary connection with the injury. They must, therefore, be specially averred in order to let in evidence of them.⁶ An allegation that by reason of the failure of the defendant to carry the plaintiff according to his contract, the plaintiff "was subjected to great inconvenience and injury," is sufficient to let in proof that the plaintiff became sick by reason of not being furnished with a sufficient quantity of bed-clothing; for this is general, and not special, damage.⁷ A passenger wrongfully ejected from a train at night, offered to prove at the trial that at the time he was put off the cars his wife was pregnant and within four months of confinement, and that after his ejection from the cars he suffered great anxiety and distress of mind on her account, believing that she would be much

¹ *Barron v. Illinois etc. R. Co.*, 1 Biss. 412, 453.

² *Railroad Co. v. Barron*, 5 Wall. 90.

³ *Chicago etc. R. Co. v. Shannon*, 43 Ill. 338; s. c. 1 Ch. Leg. N. 105.

⁴ *Ross v. Hill*, 2 C. B. 877.

⁵ *Harris v. Costar*, 1 Car. & P. 636.

⁶ *Laing v. Colder*, 8 Pa. St. 479 (citing *Sampson v. Coy*, 15 Mass. 493). See also *Ohio etc. R. Co. v. Selby*, 47 Ind. 471.

⁷ *Roberts v. Graham*, 6 Wall. 578 (citing *Ward v. Smith*, 11 Price, 19).

Denial of Contributory Negligence.

affected by his failure to arrive on the train, and by the report of his ejection which would reach her by the other passengers. There being no allegation of such anxiety and distress of mind on his part in the complaint, it was held to be error to admit evidence to prove it.¹

Impaired prospects of marriage, resulting from an injury to a female passenger, must be specially alleged in order to constitute an element in the computation of damages.² But damages for bodily pain suffered by reason of injuries received in a railroad accident need not be specially alleged. They are general damages implied by law.³ And the peculiar state of the plaintiff's health at the time of exposure in consequence of the defendant failing to carry according to advertisement, may be proved in aggravation of damages without being specially alleged.⁴ And although there is no allegation of the nature and extent of the plaintiff's business, evidence upon this point, and that on account of the injury the plaintiff was incapacitated from attending to and conducting that business, may be heard for the purpose of assisting the jury to determine whether the plaintiff sustained an injury of no slight character, and that it was followed by expense, suffering, and loss of time which had for him a pecuniary value.⁵

§ 13. Whether the Plaintiff must deny Contributory Negligence.—There is a difference of opinion among the courts as to whether the plaintiff in an action for negligence is bound to deny that he was guilty of contributory negligence on his part. It is held in several of the States, that in order to make out a *prima facie* case the plaintiff must not only show negligence on the part of the defendant, but he must also show that he was in the exercise of due care in respect to the occurrence from which the injury arose. This is held in Massachusetts,⁶

¹ Indianapolis etc. R. Co. v. Milligan, 50 Ind. 392.

² Hunter v. Stewart, 47 Me. 419.

³ Curtiss v. Rochester etc. R. Co., 20 Barb. 232 (affirmed in 18 N. Y. 534); Ohio etc. R. Co. v. Selby, 47 Ind. 471.

⁴ Heirn v. McCaughan, 32 Miss. 17.

⁵ Wade v. Leroy, 20 How. 34; Nebraska City v. Campbell, 2 Black, 590; Ballou v. Farnum, 11 Allen, 73. But see Holyoke v. Grand Trunk R. Co., 48 N. H. 541.

⁶ The first case in Massachusetts which clearly decides that the burden of proof is upon the plaintiff to show the absence of contributory negligence on his part is Lane v. Crombie, 12 Pick. 177. The court treats the question as settled, and cites as authority Butterfield v. Forrester, 11 East, 61; Harlow v. Humiston, 6 Cow. 191; Smith v. Smith, 2 Pick. 621. These cases, however, go no further than to assert the doctrine that a plaintiff cannot recover if his evidence shows he was guilty of contributory negligence. Johnson v. Hudson River R. Co., 5 Duer, 21, 25. The cases in Massachusetts follow Lane v. Crom-

bie, *supra*; Adams v. Carlisle, 21 Pick. 146; Bigelow v. Rutland, 4 Cush. 247; Bosworth v. Swansey, 10 Metc. 363, 365; Parker v. Adams, 12 Metc. 415, 417; Lucas v. New Bedford etc. R. Co., 6 Gray, 64; Robinson v. Fitchburg etc. R. Co., 7 Gray, 92; Callahan v. Bean, 9 Allen, 401; Hickey v. Boston etc. R. Co., 14 Allen, 429, 431; Gaynor v. Old Colony R. Co., 100 Mass. 208; Murphy v. Deane, 101 Mass. 455; Allyn v. Boston etc. R. Co., 105 Mass. 77; Lane v. Atlantic Works, 107 Mass. 104. It is not necessary for the plaintiff to aver due care on his part in order to introduce proof of it. May v. Princeton, 11 Metc. 442. In later cases it is held that the proof of due care on the part of the plaintiff need not be direct, but the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, on his part, in the circumstances under which the injury was received. Mayo v. Boston etc. R. Co., 104 Mass. 137; Prentiss v. Boston, 112 Mass. 43; Hinckley v. Cape Cod R. Co., 120 Mass. 257, 262.

Notes.

Maine,¹ Iowa,² Illinois,³ Connecticut,⁴ Mississippi,⁵ Michigan,⁶ and Indiana.⁷ In Pennsylvania,⁸ Missouri,⁹ Wisconsin,¹⁰ Kentucky,¹¹ Maryland,¹² Kansas, Alabama,¹⁴ Minnesota,¹⁵ New Jersey,¹⁶ and California,¹⁷ and in the Federal

¹ The law is clear and unquestioned that the plaintiff must satisfy the jury, as an affirmative fact, to be established by him as a necessary part of his case, that at the time of the accident he was in the exercise of ordinary care. *Gleason v. Bremen*, 50 Me. 222, 224; *Buzzell v. Laconia Man. Co.*, 48 Me. 113. See also *Dickey v. Maine Tel. Co.*, 46 Me. 483; *Perkins v. Eastern etc. R. Co.*, 29 Me. 307; *Merrill v. Hampden*, 26 Me. 234; *Kennard v. Burton*, 25 Me. 39, 49. Although the burden of proof of due care is upon the plaintiff, yet it may be inferred from circumstances. *French v. Brunswick*, 21 Me. 29; *Foster v. Dixfield*, 18 Me. 380.

² *Rusch v. Davenport*, 6 Iowa, 443; *Reynolds v. Hindman*, 32 Iowa, 146, 148; *Plaster v. Illinois etc. R. Co.*, 35 Iowa, 449; *Carlin v. Chicago etc. R. Co.*, 37 Iowa, 316; *Muldowney v. Illinois etc. R. Co.*, 39 Iowa, 615; s. c. 36 Iowa, 462; 32 Iowa, 176; *Patterson v. Burlington etc. R. Co.*, 38 Iowa, 279; *Way v. Illinois etc. R. Co.*, 40 Iowa, 341. While it is the settled rule in Iowa that in an action for injuries resulting from negligence the burden of proof is upon the plaintiff to show that the injury occurred without want of any reasonable care on his part, yet this may be inferred from circumstances, without being directly shown. *Nelson v. Chicago etc. R. Co.*, 38 Iowa, 564; *Murphy v. Chicago etc. R. Co.*, 45 Iowa, 661; s. c. 33 Iowa, 539.

³ *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585; *Dyer v. Talcott*, 16 Ill. 300; *Galena etc. R. Co. v. Fay*, 16 Ill. 558; *Chicago v. Major*, 18 Ill. 349; *Galena etc. R. Co. v. Jacobs*, 20 Ill. 478; *Chicago etc. R. Co. v. Hazzard*, 26 Ill. 373; *Chicago etc. R. Co. v. Gregory*, 58 Ill. 273; *Kepperly v. Ramsden*, 83 Ill. 354.

⁴ *Beers v. Housatonic R. Co.*, 19 Conn. 566; *Park v. O'Brien*, 23 Conn. 339; *Fox v. Glas-tenbury*, 29 Conn. 204.

⁵ *Vicksburg v. Hennessy*, 54 Miss. 391.

⁶ *Detroit etc. R. Co. v. Van Steinburg*, 17 Mich. 99, 119.

⁷ In an action for an injury caused by the negligence of another, it must appear from the complaint, either by express averment or by a particular showing of the facts, that the injury complained of occurred without the fault or negligence of the plaintiff. *Evansville etc. R. Co. v. Dexter*, 24 Ind. 411; *Evansville etc. R. Co. v. Hiatt*, 17 Ill. 102, 105. See also *Mount Vernon v. Duseonchett*, 2 Ind. 586; *Wabash etc. Canal v. Mayer*, 10 Ind. 400; *Indianapolis etc. R. Co. v. Keely's Admin-*

istrator, 23 Ind. 133; *Toledo etc. R. Co. v. Bevin*, 26 Ind. 443; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Pittsburgh etc. R. Co. v. Vining's Administrator*, 27 Ind. 513; *Michigan etc. R. Co. v. Lantz*, 29 Ind. 528; *Jackson v. Indianapolis etc. R. Co.*, 47 Ind. 454; *Riest v. Goshen*, 42 Ind. 339. The plaintiff must show affirmatively that his fault or negligence did not contribute to the injury. *Hathaway v. Toledo etc. R. Co.*, 46 Ind. 25, 30. The case of *Wayne County Turnpike Co. v. Berry*, 5 Ind. 286, 288, seems to hold that the plaintiff's want of contributory negligence might be inferred from the circumstances.

⁸ *Beatty v. Gilmore*, 16 Pa. St. 463; *Erie v. Schwingle*, 22 Pa. St. 384; *Pennsylvania Canal Co. v. Bentley*, 66 Pa. St. 30; *Bush v. Johnson*, 23 Pa. St. 209; *Hays v. Gallagher*, 72 Pa. St. 136 (explaining *Waters v. Wing*, 59 Pa. St. 211); *Allen v. Willard*, 57 Pa. St. 374; *Mallory v. Griffey*, 85 Pa. St. 275; *Weiss v. Pennsylvania R. Co.*, 79 Pa. St. 387; *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157; s. c. 72 Pa. St. 27. See *Pennsylvania R. Co. v. McTighe*, 46 Pa. St. 316.

⁹ *Thompson v. North Missouri R. Co.*, 51 Mo. 190; *Hicks v. Pacific R. Co.*, 65 Mo. 34; s. c. 64 Mo. 430; *Schuerman v. Missouri R. Co.*, 3 Mo. App. 565.

¹⁰ *Prideaux v. Mineral Point*, 43 Wis. 513, 524; *Hoyt v. Hudson*, 41 Wis. 105; *Achtenhagen v. Watertown*, 18 Wis. 331; *Potter v. Chicago etc. R. Co.*, 22 Wis. 615; s. c. 21 Wis. 372; *Milwaukee etc. R. Co. v. Hunter*, 11 Wis. 160. The above cases overrule the contrary doctrine held in *Dressler v. Davis*, 7 Wis. 527, and *Chamberlain v. Milwaukee etc. R. Co.*, 7 Wis. 425, 431.

¹¹ *Paducah etc. R. Co. v. Hoehl*, 12 Bush, 41; *Louisville etc. Canal Co. v. Murphy*, 9 Bush, 522.

¹² *Frech v. Phila. etc. R. Co.*, 39 Md. 574. See *Irwin v. Sprigg*, 6 Gill, 200, 206; *Baltimore v. Marriott*, 9 Md. 160.

¹³ *Kansas etc. R. Co. v. Pointer*, 14 Kan. 37; s. c. 9 Kan. 620.

¹⁴ *Smoot v. Wetumpka*, 24 Ala. 112.

¹⁵ *Hocutt v. Weitherick*, 22 Minn. 152.

¹⁶ *New Jersey Express Co. v. Nichols*, 32 N. J. L. 166; s. c. 33 N. J. L. 434; *Durant v. Palmer*, 29 N. J. L. 544; *Moore v. Central R. Co.*, 24 N. J. L. 268.

¹⁷ *Gay v. Winter*, 34 Cal. 153, 164; *Robinson v. Western Pacific R. Co.*, 48 Cal. 403, 426; *McQuiliken v. Central Pacific R. Co.*, 50 Cal. 7.

Whether Plaintiff must deny.

courts,¹ it is held that the negligence of the plaintiff contributing to the injury complained of is a matter of defence, and that, ordinarily, the burden of proving it is on the defendant. In New York² and several other States the decisions are irreconcilable.³

We apprehend that in actions by passengers against carriers the courts of each State will in this respect follow the rule which they have adopted in other actions for negligent injuries. In New York, where, as already seen, the authorities are in conflict, it has been held that to entitle a person who has been injured by an accident happening to a train of cars on which he was a passenger to recover damages for the injury, he must establish affirmatively (1) that he was guilty of no negligence which contributed to the injury; (2) that the defendant was guilty of such negligence.⁴ And the same rule obtains in Indiana.⁵ But we apprehend that this is not the law. It is in conflict with the entire body of decisions which hold that the failure of the carrier's means of transportation, whereby an accident happens to passengers, is *prima facie* evidence of negligence on his part. The rule in the cases which we have just quoted shifts the burden from the carrier to the passenger. In Missouri⁶ it is not necessary to allege that the plaintiff was, at the time of the injury, exercising due care, and not guilty of contributory negligence. In Wisconsin it has been held necessary so to allege,⁷ but the cases so holding have been overruled.⁸ In Indiana, where this rule obtains, it is sufficient if it appears from the facts stated that the plaintiff was without fault. Thus, where the plaintiff stated that the injury arose from a broken rail, which the company had carelessly left unrepaired for a long time, whereby the car in which the plaintiff was being carried as a passenger was thrown from the track, and the plaintiff thereby injured, etc., this was held a good statement without an express averment that the plaintiff was without fault.⁹ In Illinois, while it is not necessary to allege that the plaintiff was free

¹ Railroad Co. v. Gladmon, 15 Wall. 401.

² It seems the plaintiff must prove the absence of contributory negligence on his part. Warner v. New York etc. R. Co., 44 N. Y. 465 (reversing s. c. 45 Barb. 299); Besiegel v. New York etc. R. Co., 14 Abb. Pr. (N. s.) 29; Curran v. Warren etc. Man. Co., 36 N. Y. 153; Suydam v. Grand Street etc. R. Co., 41 Barb. 375; De Benedetti v. Mauchin, 1 Hilt. 213; Burke v. Broadway etc. R. Co., 34 How. Pr. 239; Holbrook v. Utica etc. R. Co., 12 N. Y. 236; s. c. 16 Barb. 113; Spencer v. Utica etc. R. Co., 5 Barb. 337; Ryan v. Hudson etc. R. Co., 1 Jones & Sp. 137; Gillespie v. Newburgh, 54 N. Y. 463, 471. But see Johnson v. Hudson River R. Co., 20 N. Y. 65; s. c. 6 Duer, 633; 5 Duer, 21; Robinson v. New York etc. Co., 65 Barb. 146; Hackford v. New York etc. R. Co., 6 Lans. 381; s. c. 43 How. Pr. 222; Squire v. Central Park etc. R. Co., 4 Jones & Sp. 436, and Button v. Hudson River R. Co., 18 N. Y. 248.

³ Lester v. Pittsford, 7 Vt. 158; Barber v. Essex, 27 Vt. 62; Hyde v. Jamaica, 27 Vt. 443; Hill v. New Haven, 37 Vt. 501; Walker v.

Westfield, 39 Vt. 246; Moore v. Shreveport, 3 La. An. 645; Walker v. Herron, 22 Texas, 55, 61; Little Miami R. Co. v. Stevens, 20 Ohio, 415, 417. In Alabama, the plaintiff need not allege his freedom from fault, in his complaint. Smoot v. Wetumpka, 24 Ala. 112. See also Dillon v. Union Pacific R. Co., 3 Dill. 319, 325. The plaintiff must show that he used ordinary care. Beardsley v. Swan, 4 McLean, 333; Hull v. Richmond, 2 Woodb. & M. 337, 345.

⁴ Deyo v. New York etc. R. Co., 34 N. Y. 9. See Button v. Hudson River R. Co., 18 N. Y. 248.

⁵ Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Michigan etc. R. Co. v. Lantz, 29 Ind. 523.

⁶ Lloyd v. Hannibal etc. R. Co., 53 Mo. 509.

⁷ Chamberlain v. Milwaukee etc. R. Co., 7 Wis. 425; Dressler v. Davis, 7 Wis. 527. ⁸ Milwaukee etc. R. Co. v. Hunter, 11 Wis. 160, and cases previously cited.

⁹ Michigan etc. R. Co. v. Lantz, 29 Ind. 523.

Notes.

from negligence, yet if the declaration shows that he was guilty of negligence, and it does not appear from the averments that his negligence in comparison with the defendant's was slight, while that of the latter was gross, it will not sustain a judgment by default.¹

§ 14. **Particularity of Statement in the Defensive Pleadings.**—The presumption, where the accident happens in consequence of the breaking of the carrier's means of transportation, being, as already seen,² that the carrier was guilty of negligence, he must, in a defensive pleading, allege facts which negative this presumption. If, as is generally the case, his defence is that the injury was the result of inevitable accident, he must state facts which, if true, show that the accident was inevitable; obviously a statement of facts which are consistent with negligence will be no defence.³ Where the injury arose from a boiler explosion, the averment of compliance with the Federal statute regulating the use of steam on vessels carrying passengers will not, without more, constitute a defence to the action. The answer must aver care and deny negligence; for the carrier may have complied with the statute and yet have been negligent.⁴

An answer that the passenger was, at the time of the accident, standing upon the platform of the car contrary to the rules of the company, of which he had notice, that it was dangerous to stand upon the platform while the train was in motion, "wherefore he says that the injury sustained by the plaintiff was the result of his own carelessness in being in an improper place," is bad, because it does not allege as a matter of fact that the plaintiff was injured by reason of his being upon the platform at the time of the accident. The conclusion of the pleader that the injury was the result of the plaintiff's own carelessness is not equivalent to such an allegation of fact.⁵

§ 15. **Variance between Allegation and Proof.**—Cases against carriers present many illustrations of the familiar rule that in order to recover there must be no substantial variance between the allegations and the proofs. The cases, no doubt, bear out the rule stated by COWEN, J., in *Weed v. Saratoga, etc. Railroad Company*,⁶ that where the action is in tort or on the custom, instead of on the contract, formal variances will be disregarded *à nisi prius*, and on a motion for a new trial the party will be allowed to amend. An objection to evidence on account of variance must be taken when the evidence is offered; it cannot be taken advantage of on motion for a new trial nor in a court of error.⁷ If it is not taken when the evidence is offered, the court may instruct the jury upon the whole field of inquiry governed by it.⁸

Proof that the wheel of a stage-coach ran off in consequence of the nut which secures the wheel being unfit for that purpose, may be made under an allegation that the coach was so carelessly provided, fitted out, etc., that it broke down.⁹

¹ *Chicago etc. R. Co. v. Coss*, 73 Ill. 394.

² *Ante*. p. 209.

³ *Burns v. Cork etc. R. Co.*, Irish Rep. 13 O. L. 543.

⁴ *Curran v. Cheeseman*, 1 Cin. Superior Ct. 52.

⁵ *Lafayette etc. R. Co. v. Sims*, 27 Ind. 59.

⁶ 19 Wend. 534.

⁷ *Roberts v. Graham*, 6 Wall. 578, 581 (cit-

ing *Mosher v. Lawrence*, 4 Denio, 421; *Lawrence v. Barker*, 5 Wend. 305; *Newberry v. Lee*, 3 Hill, 523; *McMicken v. Brown*, 6 Mart. (N. S.) 86; *Goslin v. Corry*, 7 Man. & G. 347; *Doe v. Benjamin*, 9 Ad. & E. 644).

⁸ *Boyce v. California Stage Co.*, 25 Cal. 460.

⁹ *Ware v. Gay*, 11 Pick. 106.

Between Allegations and Proofs.

But under a declaration that the defendant "negligently drove, conducted, and managed his coach," there can be no recovery if the negligence proved was in sending out an insufficient coach.¹ So, where the allegation was that the injury was produced by defective ties, a defective wheel, and the unskilfulness of the company's servants, it was error to permit the plaintiff to introduce evidence to show that the accident was caused by the high rate of speed of the defendant's train.² An allegation that the passage-money was paid *by the plaintiff* is sustained by proof that it was paid by the charterers of the ship, to whom the plaintiff was clerk, and for whom he acted as supercargo on the voyage.³ When the carrier fails to transport the passenger according to the contract, passage-money may be recovered under a count for money had and received, but not for money lent and advanced, or for money paid, laid out, and expended.⁴ So, an allegation of the delivery of baggage to a carrier by the plaintiff is supported by evidence of the delivery by an agent of the plaintiff.⁵ Under a count setting out a contract to transport the plaintiff in a particular vessel, the plaintiff cannot recover damages for failing to transport him in any vessel, — the particular vessel having been wrecked. He can only recover the passage-money which he paid, with interest.⁶

Under a declaration which stated that the defendant contracted to carry the plaintiff from London to Blackheath, evidence was given that the coach ran from Charing Cross to Blackheath, that it was inscribed "London to Blackheath," and that the plaintiff got on at the Elephant and Castle, that being within what is commonly called London; and this was no variance.⁷ So, a declaration that the plaintiff delivered a trunk to the defendant, to be put into a coach at *Chester in the county of Chester*, was supported by evidence that it was delivered in the city of Chester, which is a county of itself, separate from the county of Chester at large, there being no evidence offered of the existence of any other place called Chester.⁸ And where the complaint charged the defendants as common carriers generally, without defining their route, proof that they confined themselves to New York and Brooklyn was held to create no variance.⁹

Where two persons, A. and B., jointly undertook the management of a stage-wagon, each with his own horses for a specified distance, and were jointly interested in the profits, and an action was brought by a passenger against A. only, for an injury which he had sustained while being transported by the servants of A. and B., an averment that the negligence was that of the driver of A. was sustained by proof that the driver was actually employed by B. in conducting the wagon for his own stages.¹⁰

In trespass on the case against a carrier, the principle applies that evidence cannot be given of an act which amounts to an independent trespass, unless it is counted upon in the declaration. Thus, where the counts were for a failure to

¹ *Mayor v. Humphreys*, 1 Car. & P. 251.

² *Toledo etc. R. Co. v. Beggs*, 85 Ill. 80.
Compare *Union Pacific R. Co. v. Hand*, 7 Kan. 380.

³ *Young v. Fewson*, 8 Car. & P. 55.

⁴ *Briggs v. Vanderbilt*, 19 Barb. 222.

⁵ *Richards v. Westcott*, 2 Bosw. 590.

⁶ *Briggs v. Vanderbilt*, 19 Barb. 222.

⁷ *Ditcham v. Chivis*, 4 Bing. 706; *s. c.* 1 Moo. & P. 735.

⁸ *Woodward v. Booth*, 7 Barn. & Cress. 301.

⁹ *Richards v. Westcott*, 2 Bosw. 589.

¹⁰ *Waland v. Elkins*, 1 Stark. 272.

Notes.

transport to his destination and forcibly bringing him back to the starting-point, and it appeared that the plaintiff had purchased a ticket with a counterfeit note, and that the conductor had, as instructed, insisted on good money, and had taken from him a hundred-dollar bill, giving it to the conductor of the returning train on which the passenger went back, and that the latter conductor carried the bill beyond the original starting-point, so that the plaintiff had to telegraph for it, it was held that testimony as to the act of the second conductor in temporarily detaining the bill was improperly admitted.¹

Every thing is admissible under the *general issue* which shows that the carrier was not guilty of any thing actionable in respect of the matters charged in the declaration.²

§ 16. *Points of Evidence.*—(1.) *Presumptions.*—We have already seen that a presumption of negligence arises against the carrier from an occurrence of an accident through the failure of any of his means of transportation.³ A collision between two boats in an open river where they are accustomed to pass, where there is room to pass, and where they are in plain sight of each other, is evidence of negligence which puts the burden on the defendant to show how it happened.⁴ So, proof of a collision on a railroad whereby a passenger is injured is *prima facie* evidence of negligence, shifting the burden upon the company to excuse it.⁵ There is no presumption that a conductor has authority to permit a passenger to ride on the engine, and the *onus* is on such a person to show such authority.⁶ Every one riding upon a railroad car is presumed to be lawfully there as a passenger, and the *onus* is upon the carrier to prove that such a person is a trespasser.⁷ Stopping a passenger-train at an unusual place renders the company presumptively wrong to that extent, and the *onus* is on them to show that it was right.⁸ Where a carrier defends an action for loss of baggage on the ground that his liability as a carrier had ceased, and that he was only liable as a warehouseman, the burden is on him to show that the goods were stored in a safe and secure warehouse.⁹

(2.) *Want of Skill in the Carrier's Servant.*—Where the want of skill in a stage-driver is in issue, it must be proved in the same manner as character is in general proved,—by general evidence as to his character for skill, and not by proof of particular facts which go to show a want of skill.¹⁰ So, in an action for an injury alleged to have been caused by unskilful driving of the carrier's servant, it has been held that evidence of similar negligent acts on his part at other times was not admissible.¹¹ Nor is it competent to show negligence at other

¹ *Memphis etc. R. Co. v. Chastine*, 54 Miss. 503.

² *Jerome v. Smith*, 43 Vt. 230.

³ *Ante*, p. 203. See also *Sherlock v. Alling*, 44 Ind. 184; *Lambeth v. North Carolina R. Co.*, 66 N. C. 494; *Toledo etc. R. Co. v. Beggs*, 85 Ill. 80; *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71; *Chamberlain v. Milwaukee etc. R. Co.*, 7 Wis. 425; *Pittsburgh etc. R. Co. v. Pillow*, 76 Pa. St. 510.

⁴ *Sherlock v. Alling*, 44 Ind. 184.

⁵ *New Orleans etc. R. Co. v. Allbritton*, 33 Miss. 242.

⁶ *Robertson v. N. Y. etc. R. Co.*, 22 Barb. 91.

⁷ *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339.

⁸ *Memphis etc. R. Co. v. Whitfield*, 44 Miss. 466.

⁹ *Bartholomew v. St. Louis etc. R. Co.*, 53 Ill. 227.

¹⁰ *Kinney v. Neil*, 1 McLean, 540.

¹¹ *Maguire v. Middlesex R. Co.*, 115 Mass. 239.

Declarations — Conduct of other Passengers.

times by other agents of the company, — as, that conductors had been negligent in calling out names of stations.¹

(3.) *Res Gestæ*. — (a.) *Declarations of the Plaintiff*. — The representations made by a sick or wounded man as to the nature, symptoms, and effects of the trouble under which he is laboring at the time, are received as original evidence.² They are of greater weight when made to a medical attendant, but they are not rejected when made to any person.³ A reasonable and just qualification of this rule is that the statements must have been made under circumstances freeing them from the suspicion of having been spoken with reference to future litigation, and giving them the character of *res gestæ*.⁴ But a party will not be permitted to prove what he himself stated to his physician, not in regard to the character and manifestations of his malady, but in regard to its specific cause, when that is one of the issues before the jury.⁵ When the statements were made to the physician some weeks after the injury, it was held that the length of time which had elapsed, though it would not warrant the rejection of the evidence, was a proper circumstance for the consideration of the jury.⁶

Declarations of the plaintiff made at the time of the accident, tending to explain its character, are admissible as part of the *res gestæ*; and whether they were real or feigned should be determined by the jury, from all the circumstances of the case.⁷ Declarations of a passenger who was injured in a railway accident while riding on the platform of a car, and the fact that he was injured through his own fault, are admissible in evidence against him, though not conclusive.⁸

(b.) *Conduct of the Other Passengers*. — In an action for damages for injuries received in a railway collision, where there is a question as to the negligence of the plaintiff, evidence may be given of the conduct and exclamations of other passengers, in order to show how the circumstances of danger impressed every one, and to vindicate the plaintiff from the charge of rash conduct and imprudence from undue alarm. Such general conduct, given with the exclamations involuntarily made by the passengers in consequence of the appearances of imminent peril, may be regarded as a part of the *res gestæ* for this purpose.⁹ Remarks made by other passengers in rescuing the plaintiff from an attack of the carrier's servant are admissible as part of the *res gestæ*.¹⁰ It is allowable to prove in mitigation of damages, for the purpose of explaining the reason why a brakeman was armed with a billet of wood, with which a passenger was struck, that in that locality the train had been boarded with roughs and confidence-men, who had attacked the brakeman.¹¹

¹ Southern R. Co. v. Kendrick, 40 Miss. 374.

² Brown v. Hannibal etc. R. Co., 66 Mo. 538, 599.

³ Perkins v. Concord R. Co., 44 N. H. 223 (citing 1 Greenl. on Ev., § 101; 1 Ph. on Ev. 191; Aveson v. Kennaird, 6 East, 188; Bacon v. Charlton, 7 Cush. 581; Howe v. Plainfield, 41 N. H. 135). See also Matteson v. New York etc. R. Co., 62 Barb. 364; The State v. Davidson, 30 Vt. 377; Caldwell v. Murphy, 11 N. Y. 416; Murphy v. New York etc. R. Co., 66 Barb. 125.

⁴ Illinois etc. R. Co. v. Sutton, 42 Ill. 433.

⁵ Ibid.

⁶ Murphy v. New York etc. R. Co., 66 Barb. 125.

⁷ Frink v. Coe, 4 G. Greene, 555.

⁸ Zemp v. Wilmington etc. R. Co., 9 Rich. L. 81.

⁹ Galena etc. R. Co. v. Fay, 16 Ill. 553.

¹⁰ Sherley v. Billings, 8 Bush, 147.

¹¹ Chicago etc. R. Co. v. Boger, 1 Bradw. 472.

Notes.

(c.) *Conduct of the Defendant.*—A plaintiff injured while on shipboard may show that after the injury he applied to the master of the ship for some of his men to remove him into a carriage, and that the master refused, saying that he had enough for his men to do. Such evidence is material as a part of the transaction, and also upon the question of damages.¹

(d.) *Statements of the Defendant's Servants.*—The rule as stated by Mr. Justice STORY is, that "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting parts of the *res gestæ*."² "A close attention to this rule, which is of universal acceptance," says Mr. Justice STRONG, "will solve almost every difficulty."³ The distinction to be always kept in mind is between words spoken at the time of the transaction, which may be treated as verbal acts of the agent, and words spoken afterwards without the authority of his principal, which are merely in the nature of a narrative of a past occurrence. An act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held or an isolated act done at a later period.⁴ "The reason," continues Mr. Justice STRONG, "is, the agent to do an act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ*."⁵ Applying these doctrines, a conversation between the captain of a steamboat and a passenger who had been injured in getting on his boat two days and a half previously, in which the captain attributed it to the carelessness of the servants of the boat, is not evidence against the owners of the boat, though the captain and boat were still on the voyage on which the injury occurred.⁶ In like manner, in an action for loss of baggage, the admissions made by the conductor, baggage-master, or station-master, in answer to inquiries made on behalf of the passenger, the next morning after the loss, are no part of the *res gestæ*, and inadmissible.⁷ So, where the plaintiff was injured by falling through an uncovered bridge of the defendant in endeavoring to get upon one of the defendant's trains, it was held that declarations of the conductor made after the accident, that the company had been guilty of negligence, were inadmissible.⁸ A railway company can in no event be bound by the subsequent declarations of one of its *brakemen* as to the cause of a disaster.⁹ So, the subsequent declarations of a stage-driver of the defendant—not the one who drove the particular stage which upset—that the stage was top-heavy and overloaded, were not admissible,¹⁰ though statements of the same import made at the time of the accident, by the driver in charge, were held competent.¹¹ So, the declarations of a

¹ Hall v. Connecticut River Steamboat Co., 13 Conn. 319.

² Story on Ag., § 134.

³ Packet Co. v. Clough, 20 Wall. 528, 540.

⁴ Taylor on Ev., § 541. See Stiles v. Western R. Co., 8 Metc. 44; Cooley v. Norton, 4 Cush. 93; Corbin v. Adams, 6 Cush. 95; Tomlinson v. Collett, 3 Blackf. 426; Hynds v. Hays, 25 Ind. 31; Lafayette etc. R. Co. v. Ehman, 30 Ind. 83; Bennett v. Holmes, 32 Ind. 108; Bellefontaine R. Co. v. Hunter, 33

Ind. 335; Rathel v. Brady, 44 Ind. 412; Dickinson v. Colter, 45 Ind. 445.

⁵ Packet Co. v. Clough, *supra*. ⁶ *Ibid*.

⁷ Morse v. Connecticut River R. Co., 6 Gray, 450.

⁸ Chicago etc. R. Co. v. Fillmore, 57 Ill. 265.

⁹ Michigan etc. R. Co. v. Carrow, 73 Ill. 348; Mich. etc. R. Co. v. Gougar, 55 Ill. 503.

¹⁰ Maury v. Talmage, 2 McLean, 157

¹¹ Stokes v. Saltonstall, *ante*, p. 183.

 Experts.

brakeman concerning the cause of the inflicting of an injury upon the passenger, made on the same night of the injury, but afterwards, were not admissible.¹

But this principle may not be of strict application where the agent making the statements or admissions is the manager of the company, so that he may be deemed for certain purposes its vice-principal, or even the company itself. Thus, where a passenger, who had been assaulted and put off a street-car by its conductor, went to the superintendent of the company to complain about it, and the latter told him to "hush up," that he had directed the drivers to throw him out of the cars for the reason that he did not pay, this declaration was held competent evidence.² But the soundness of this case cannot be conceded. In Louisiana, the declarations of the superintendent of a railway company, made in conversation with a witness after an accident in which the plaintiff, a passenger, was injured, were held not admissible, because not binding upon the company; the court saying that no one but a board of directors had power to make admissions in regard to the controversy, which would bind the company,—that no ordinary agent of the company would possess that power unless it had been expressly delegated to him.³ Where the accident was caused by the giving way of an embankment of a railway, and it became material to prove the condition of the embankment, declarations made by the engineer who constructed it, at the time when he constructed it, were held admissible.⁴

(4.) *Testimony of Expert Witnesses.*—It is not necessary that a physician should be a graduate of a medical college, or have a license from some medical board, in order to be qualified to testify as an expert in relation to the extent of an injury which a passenger has received in a railway collision. One who without these qualifications had attended a course of lectures, and studied the science of medicine three years before he commenced to practice, was held competent.⁵ The proper mode of inquiry in examining an expert witness is to ask his opinion upon a hypothetical state of facts such as appears from the evidence;⁶ and the admission of the answer of a medical expert to a supposititious statement which has been made to him, illustrative of the case on trial, affords no ground of exception.⁷ The rule being that the injured passenger is entitled to recover damages for prospective suffering and loss occasioned by the injury,⁸ it is obviously competent for him to prove by the testimony of medical experts how long the injury which the accident inflicted on him will be likely to continue.⁹ Where the inquiry is as to the extent and character of the injuries received by the plaintiff, a physician may give his testimony as to the cause of the injury with which, according to the testimony, the plaintiff is afflicted; but he must state the facts upon which his opinion is based.¹⁰ In an action for negligently steering a ship, whereby it was wrecked and the plaintiff lost her passage, it

¹ Pittsburgh etc. R. Co. v. Theobald, 51 Ind. 246.

² Malecek v. Tower Grove etc. R. Co., 57 Mo. 17.

³ Hill v. New Orleans etc. R. Co., 11 La. An. 292.

⁴ Brehm v. Great Western R. Co., 34 Barb. 256.

⁵ New Orleans etc. R. Co. v. Allbritton, 38 Miss. 242.

⁶ Spear v. Richardson, 37 N. H. 23.

⁷ Perkins v. Concord R. Co. 44 N. H. 223.

⁸ *Infra*, § 19.

⁹ Taylor v. Grand Trunk R. Co., 48 N. H. 304; Toledo etc. R. Co. v. Baddely, 54 Ill. 19; Matteson v. New York etc. R. Co., 62 Barb. 364.

¹⁰ *Ibid.* See Jefferson Ins. Co. v. Cothéal, 7 Wend. 78; 1 Cow. & Hill's Notes, 761-763.

Notes.

was competent to call experienced nautical men and ask them whether, in their judgment, particular facts which had been proved amounted to gross negligence.¹ Evidence of a conductor as to whether guard-chains put on a railway car would have prevented the accident was held not admissible, but its admission was, under the circumstances, no ground of error.² An experienced railroad man, who has made the management of cars, engines, etc., his business for years, is as fairly an expert as one skilled in any other art, and his evidence is entitled to stand on the same footing. But an explanation given by such a witness as to the meaning of a notice that "Passengers must not stand on the platform" is not admissible: the words stand for themselves.³

(5.) *Opinions of Non-Expert Witnesses.*—There are many cases where the opinions of non-expert witnesses are admissible as to questions which are not matters of science. The driver of a stage-coach which broke down may state whether the coach was safe and in good condition, and, if not, what were its defects.⁴ A witness who had ridden in a railway train with a party composed of adults and children, during a portion of two days, was permitted to express his opinion, formed from his observation of their demeanor, dress, conversation, and general appearance, that they were of one family and of German nationality.⁵ The opinion of a witness as to whether a certain place on a steamboat is manifestly, to the discernment of passengers of common understanding, an inappropriate place for passengers to be in, is not admissible.⁶ The opinion of a witness as to whether or not "the plaintiff would likely have received the injury he did if his arm and elbow had been inside the car," is inadmissible.⁷ An opinion of a witness as to the length of time the passenger who was injured stood on the platform has been held not admissible, if given as an opinion; otherwise if he stated it as a fact, from his presence there immediately before and immediately after the collision.⁸ An objection to the statement of a witness, taken in general terms, will not be sufficient to save, on appeal, a question of its competency on the ground that it was a statement of a matter of opinion; the objection must be specifically made.⁹ There is nothing in the question as to what caused a railway train to run off the track on the concave side of the curve which calls for an explanation by an expert witness; and a good architect and mechanic who has examined the scene of the accident is not incompetent, by reason of not being an expert railroad man, to give his opinion on that subject.¹⁰

(6.) *Other Matters.*—Parol evidence is admissible to show a rule of the defendant, a railway company, that passengers are not to be upon the platform while the train is in motion.¹¹ Admitting useless and idle testimony—as, that it was unsafe to drive six horses—is no ground for a new trial, unless it be clearly shown that it misled the jury or might have done so.¹² A stage proprietor, defending an action brought by a passenger, may prove a general custom as to the number of passengers carried in a stage of the same size as the one in

¹ *Malton v. Nesbit*, 1 Car. & P. 70.

² *Bixby v. Montpelier etc. R. Co.*, 49 Vt. 123.

³ *Macon etc. R. Co. v. Johnson*, 38 Ga. 409.

⁴ *Frink v. Potter*, 17 Ill. 406.

⁵ *Kansas Pacific R. Co. v. Miller*, 2 Col. 442.

⁶ *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 362.

⁷ *Winters v. Hannibal etc. R. Co.*, 39 Mo. 468.

⁸ *Macon etc. R. Co. v. Johnson*, 38 Ga. 409.

⁹ *Walker v. Erie R. Co.*, 63 Barb. 260.

¹⁰ *Murphy v. New York etc. R. Co.*, 66 Barb. 125.

¹¹ *Yonge v. Kinney*, 28 Ga. 111.

¹² *Taylor v. Day*, 16 Vt. 566.

 Various Matters.

question, but he cannot prove that it was the custom on his own route to carry that number; for he cannot make a custom, and then appeal to it in justification of his own act.¹ Where the injury complained of was received in a railroad accident, it has been held incompetent to admit testimony as to the condition of the road at a point a mile and a half distant from the accident, or that new ties were subsequently put in in the neighborhood of the accident.² But where the judge who tried the case admitted evidence showing the general bad state of the defendant's railway track for several miles distant from the place of the accident, as one of the causes probably contributing to the accident, the Supreme Court refused to set aside the verdict.³ It has been held in New York that where the condition of the ties near to where the cars ran off the track could not be ascertained, it was competent to show the condition of those near to it; thus laying the foundation for the inference that if the ties were damaged or decayed in the immediate vicinity of the accident, they would have been so at the place where the cars ran off the track.⁴ What evidence is sufficient to show that the defendants were common carriers at the time of the accident, and had undertaken to transport the plaintiff over their route, has been ruled at some length in a Vermont case.⁵ There is no objection to the plaintiff exposing the injured limb to the surgeon called upon to describe the injury before the jury.⁶ Where the action was for an injury received by a passenger while riding on the defendant's train, by a collision with another train, evidence of the habits of the conductor of the other train was held competent. If he was addicted to intoxication, this would raise a presumption of negligence.⁷ Where the claim of the plaintiff is that the injury occurred in consequence of the train not stopping a sufficient time at the station, it is competent for the plaintiff to show the usual and customary period of stopping at that place.⁸ To corroborate the testimony of the conductor as to the time of the arrival of his train at a station, it is competent to show that he made a contemporaneous memorandum, in compliance with a regulation requiring it; and the time-table regulating the running, stoppages, etc., of such train may be proved.⁹ So may regulations of the corporation and the custom of its agents in respect of their giving notice to passengers of the necessity of their changing cars in order to reach a given station.¹⁰ Where the question was as to the character of a stream, a railway bridge over which had been destroyed by a flood, and whether the railway company was not negligent in not foreseeing and providing against such an accident, it was held that evidence of floods subsequent to that which caused the injury was improperly received.¹¹ Where a railway company was sued for the act of its conductor in expelling the plaintiff from one of its trains, a witness was allowed to give a

¹ *Maury v. Talmadge*, 2 McLean, 157.⁹² *Reed v. New York etc. R. Co.*, 45 N. Y. 574.³ *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541.⁴ *Murphy v. New York etc. R. Co.*, 66 Barb. 125.⁵ *Bixby v. Montpelier etc. R. Co.*, 49 Vt. 123.⁶ *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370.⁷ *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339. On the question whether intoxication is evidence of negligence, see 1 *Thomp. on Neg.*, pp. 388, 430; 2 *id.* 1174, 1203.⁸ *Fuller v. Naugatuck R. Co.*, 21 Conn. 557.⁹ *Barker v. New York etc. R. Co.*, 24 N. Y. 599.¹⁰ *Ibid.*¹¹ *Kansas Pacific R. Co. v. Miller*, 2 Col. 442.

Notes.

conversation which he heard behind him on the train, supposed to be between the conductor and the plaintiff, leaving other witnesses to identify the persons between whom it took place.¹

§ 17. **Province of Court and Jury.**²—Whether the carrier or his servant has been negligent, or whether the passenger was guilty of negligence contributing to the injury on the other hand, will generally be a question for the jury,³ though in the view of some courts it is a question for the court where there is no conflict as to the evidence.⁴ In Maryland it is held that where the injury arose from a known violation of the rules of the carrier by the passenger, the question of negligence is a question for the court; and in such a case there can be no recovery.⁵ The judge may decide the case by peremptory instructions, or by directing a nonsuit, according to the practice of the court, where, assuming all the evidence which works in favor of the plaintiff to be true, no fair-minded man could draw from such evidence the inference that the defendant has been guilty of a want of that degree of care which he was bound to exercise under the circumstances. More broadly, he so decides where there has been no failure of duty on the part of the defendant,—as, where the accident arose from something which the carrier was not bound to anticipate or guard against.⁶ But the case must go to the jury—

1. Where facts which, if true, would constitute “evidence of negligence” are controverted.⁷ To illustrate: In Maryland, if it appear that the plaintiff was injured in consequence of having voluntarily put his arm out of the window of a railway coach, he cannot recover. Yet if there is a conflict of testimony as to how his arm came to be thus exposed, the case must go to the jury.⁸

2. Where, although the facts are not controverted, fair-minded men might differ as to whether the inference of negligence should be drawn from them;⁹ in other words, where the facts do not amount to what the books term “evidence

¹ Indianapolis etc. R. Co. v. Anthony, 43 Ind. 183.

² This question, in its relation to the general law of negligence, is considered more at length in 2 Thomp. on Neg., pp. 1235-1240.

³ Allender v. Chicago etc. R. Co., 37 Iowa, 264; Zemp v. Wilmington etc. R. Co., 9 Rich. L. 84; Memphis etc. R. Co. v. Whitfield, 44 Miss. 467; Crissey v. Hestonville R. Co., 75 Pa. St. 83; Sullivan v. Phila. etc. R. Co., 30 Pa. St. 234; Thatcher v. Great Western R. Co., 4 Upper Canada C. P. 543; Simmons v. New Bedford etc. Steamboat Co., 97 Mass. 361; Brehm v. Great Western R. Co., 34 Barb. 256.

⁴ Halpin v. Third Avenue R. Co., 8 Jones & Sp. 175. See also Gagg v. Vetter, 41 Ind. 228, 254; Louisville etc. R. Co. v. Murphy, 9 Bush, 522; Costello v. Landwehr, 28 Wis. 522, 529; Grigsby v. Chappel, 5 Rich. L. 446; Pittsburgh etc. R. Co. v. Evans, 53 Pa. St. 250; Flemming v. Western Pacific R. Co., 49 Cal. 253; Van Lien v. Scoville Man. Co., 4 Daly, 554; Foot v. Wiswall, 14 Johns. 304; Thirings v. Central

Park R. Co., 7 Robt. 616; Biles v. Holmes, 11 Ired. L. 16; Dascomb v. Buffalo etc. R. Co., 27 Barb. 221; Dublin etc. R. Co. v. Slattery, 3 App. Cas. 1155, 1201, per Lord Blackburn.

⁵ Baltimore R. Co. v. Wilkinson, 30 Md. 224, 232.

⁶ Daniel v. Metropolitan R. Co., L. R. 5 H. L. 45.

⁷ Saltonstall v. Stockton, 1 Taney's Dec. 11; Pittsburgh etc. R. Co. v. Andrews, 39 Md. 329; Chicago City R. Co. v. Young, 62 Ill. 238; Bernhardt v. Rensselaer etc. R. Co., 32 Barb. 166.

⁸ Pittsburgh etc. R. Co. v. Andrews, 39 Md. 329.

⁹ Gaynor v. Old Colony etc. R. Co., 100 Mass. 208; Paterson v. Wallace, 1 Macq. H. L. Cas. 748; Johnson v. Hudson etc. R. Co., 20 N. Y. 65; Phila. etc. R. Co. v. Spearen, 47 Pa. St. 300; Mangani v. Brooklyn etc. R. Co., 38 N. Y. 455; West Chester etc. R. Co. v. McElwee, 67 Pa. St. 311; Seabrook v. Hecker, 2 Robt. 291; Hayercroft v. Lake Shore etc. R. Co., 64 N. Y. 636.

Demurrer to Evidence.

of negligence." And where the court directs a verdict for the defendant, the plaintiff is entitled to have every thing on which his right to recover depends, and which the proof tended to establish, regarded as proved.¹

3. Where, at the same time, the facts are in dispute, and the inferences which fair-minded men would draw from them are doubtful.² More briefly, the question of negligence is said to be for the jury when there is a substantial doubt as to the facts, or as to the inferences to be drawn from them;³ and it is for the court only where the facts are undisputed and the inference of negligence is clear.⁴ The foregoing doctrines apply in favor of the plaintiff as well as in favor of the defendant; so that where the court can see from the undisputed evidence that the defendant was guilty of negligence, it will set aside a verdict for the defendant and award a *venire de novo*.⁵

The following matters have been held questions for the jury: Whether a railway company has been guilty of negligence in not ascertaining the utility of the latest improvements which have been devised for the protection of passengers, and in not adopting them.⁶ Whether the act which occasioned the injury was wilful and malicious, in such a sense as to be beyond the scope of the servant's authority, or whether it was mistakenly conceived to be a necessary use of force to effect a removal of a passenger from the train.⁷ Whether a passenger injured while standing on the platform knew that it was a prohibited place, and, if so, whether under the circumstances his act so contributed to the injury as to exonerate the company.⁸ As already seen, a presumption of negligence arises against the carrier from the happening of the accident to the passenger from a failure, during the transit, of some of the carrier's means of transportation.⁹ Whether the circumstances exist which repel this presumption is a question of fact for the jury, to be determined from all the evidence in the case.¹⁰

§ 18. **Demurrer to Evidence.** — A demurrer by one party to the evidence admits every thing which the evidence *tends* to prove in favor of the other party: and the reason is that the judge is not permitted either to determine controverted facts, or to say what inferences of fact shall be drawn from the facts proved. Its sole object is so to present the case to the judge that he shall deter-

¹ *Stone v. Chicago etc. R. Co.*, 47 Iowa, 82; s. c. 10 Ch. Leg. N. 78; 6 Reporter, 489; *McClenaghan v. Brock*, 5 Rich. L. 17.

² *Nichols v. Sixth Avenue R. Co.*, 38 N. Y. 131. See also *Railroad Co. v. Stout*, 17 Wall. 657; *Fernandez v. Sacramento City R. Co.*, 4 Cent. L. J. 82; *Detroit etc. R. Co. v. Van Steinburg*, 17 Mich. 99; *The State v. Railroad Co.*, 52 N. H. 529; *Gaynor v. Old Colony etc. R. Co.*, 100 Mass. 208, 212; *McGrath v. Hudson River R. Co.*, 32 Barb. 144; s. c. 19 How. Pr. 211; *Bridges v. North London R. Co.*, L. R. 7 H. L. 213; *Beers v. Housatonic R. Co.*, 19 Conn. 566; *Vinton v. Schwab*, 32 Vt. 612; *Pennsylvania Canal Co. v. Bentley*, 66 Pa. St. 30, 34; *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Norton v. Ittner*, 56 Mo. 351; *Stoddard v. St. Louis etc. R. Co.*, 65 Mo. 514; *Jenkins v. Little Miami R. Co.*, 2 Disney, 49.

³ *Crissey v. Hestonville etc. R. Co.*, 75 Pa. St. 83; *Barton v. St. Louis etc. R. Co.*, 52 Mo. 253.

⁴ *Dickens v. New York etc. R. Co.*, 1 Abb. App. Dec. 504.

⁵ *Derwort v. Loomer*, 21 Conn. 245; s. c. 1 Am. L. Reg. 479.

⁶ *Hegeman v. Western R. Co.*, 13 N. Y. 9, ante, p. 160.

⁷ *Jackson v. Second Avenue R. Co.*, 47 N. Y. 274.

⁸ *Zemp v. Wilmington etc. R. Co.*, 9 Rich. L. 84.

⁹ Ante, p. 209.

¹⁰ *Sullivan v. Philadelphia R. Co.*, 30 Pa. St. 234; *Brehm v. Great Western R. Co.*, 34 Barb. 256.

Notes.

mine what inferences of law shall be drawn from the facts which the evidence tends to prove. It is therefore in the nature of a demurrer to a pleading, which admits all the facts which are well pleaded to be true; or to a special verdict, where, the jury having found the facts, the judge announces what conclusions of law shall be drawn therefrom. It is never safe, therefore, to demur to the evidence where there is any evidence tending to prove negligence; for then the judge will accept this evidence as true, and from it determine that there was negligence as a conclusion of law.¹ On overruling demurrer to the evidence, the judge cannot enter up a judgment, but must direct an inquiry of damages by a jury.²

§ 19. **All Damages, present and prospective, may be recovered.**—An action for injuries to the person of a passenger may be brought at any time after the injuries occur, within the time fixed by the statute of limitations, and but one action can be brought therefor.³ Such an action is unlike that for a continuing nuisance,⁴ or for enticing a servant away where the servant was apprenticed for a term of years,⁵ or for enticing a wife away,⁶ or for the continuation of false imprisonment after action brought,⁷ or for trespass upon land.⁸ In the case of actions for injuries to the person, the cause of action is founded on the wrong and damage combined, and a new action cannot be brought simply because new damage ensues without new wrong; while in the other cases mentioned, as in the case of false imprisonment after action brought, a new action may be brought for all damage which is sustained subsequent to the bringing of the former suit. "Where successive actions may be brought for a continuous wrong, as in the case of a trespass upon land, the damages in each suit are very properly limited to those sustained by the plaintiff at its commencement; but for an injury to the person, resulting from a single act, a single action only can be brought, and it therefore would be manifestly unjust not to take into consideration, upon the trial, the nature and extent of the injury in all its consequences; since by not so doing, the plaintiff, in many cases, would be deprived of the larger portion of the compensation he might justly claim, and the damages given be wholly disproportioned to the injury sustained."⁹ Therefore the plaintiff in an action for an injury to his person as a passenger may recover not only the damage he has sustained up to the time of bringing the suit, but also all prospective damages which the evidence renders it reasonably certain must necessarily result from the injury.¹⁰ And it follows that where the evidence shows

¹ As to the practice under a demurrer to the evidence, see *Wright v. Pindar*, Style, 34; *Copeland v. New England Ins. Co.*, 22 Pick. 133; *Young v. Black*, 7 Cranch, 563; *Fowle v. Alexandria*, 11 Wheat. 322; *Mobile etc. R. Co. v. McArthur*, 43 Miss. 180; *Fent v. Toledo etc. R. Co.*, 1 Thomp. on Neg., p. 136; s. c. 59 Ill. 349.

² *Mobile etc. R. Co. v. McArthur*, 43 Miss. 180.

³ *Curtiss v. Rochester etc. R. Co.*, 20 Barb. 282, 292 (affirmed in 18 N. Y. 534).

⁴ *Hopkins v. Atlantic etc. R. Co.*, 36 N. H. 9.

⁵ *Whitney v. Clarendon*, 18 Vt. 252; *Hambleton v. Veere*, 2 Saund. 169.

⁶ *Whitney v. Clarendon*, 18 Vt. 252; *Ward v. Rich*, 1 Vent. 103.

⁷ *Whitney v. Clarendon*, 18 Vt. 252; *Brasfield v. Lee*, 1 L. Raym. 329.

⁸ *Caldwell v. Murphy*, 1 Duer, 233, 240.

⁹ *Ibid.*

¹⁰ *Klein v. Jewett*, 26 N. J. Eq. 474; *Memphis etc. R. Co. v. Whitfield*, 44 Miss. 466; *Curtiss v. Rochester etc. R. Co.*, 20 Barb. 282 (affirmed, 18 N. Y. 534); *Caldwell v. Murphy*, 1 Duer, 233 (affirmed, 11 N. Y. 416); *Matteson v. New York etc. R. Co.*, 62 Barb. 364; *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541; *Black v. Carrollton R. Co.*, 10 La. An. 33; *Frink v. Schroyer*, 18 Ill. 416.

Should not be conjectural.

that injuries continued to exist up to the time of the trial, the testimony of a physician as to the plaintiff's condition four months after the injury occurred,¹ and even after the suit was instituted, is admissible;² and the plaintiff may amend his declaration after suit brought, so as to increase the amount of damages claimed.³

§ 20. **Permanent Injuries — Life-Tables.** — It is also competent for the plaintiff to show that the injuries complained of are permanent in their nature,—that he will probably not recover from their effects;⁴ and when there is such testimony, it is not improper to introduce in evidence standard life-tables to show the expectancy of life of one of the age of the injured party, as a basis upon which to estimate the amount of damages he should recover.⁵

§ 21. **Damages should be obvious, and not conjectural or speculative.**⁶ — The damages allowed should be such as result directly from the injury sustained.⁷ Thus, it is said: "Damages produced by other agencies than those causing the injury, or even by agencies remotely connected with those causing the injury, cannot be awarded as proximate or proper compensation, but only where the injury flows from the wrongful act as its natural concomitant, or as the direct result thereof. Where speculation or conjecture has to be resorted to for the purpose of determining whether the injury results from the wrongful act or from some other cause, then the rule of law excludes the allowance of damages for such injury."⁸ Thus, in the case from which we have just quoted, it appeared that where a train failed to stop at a station where a passenger was waiting for it, to be transported to another station, and he, instead of hiring another conveyance or waiting till the next train came, walked to his place of destination, in very cold weather, and on account of the exposure became sick, it was held that his sickness and the loss to him thereby occasioned were not elements of the damages he could recover; that if his business required it, he might have hired another conveyance, and the company would have been liable for such actual damages as he could prove in the way of necessarily increased expenses either in waiting or procuring another vehicle, and such loss to his business as he might suffer on account of the delay, but *he had no right to inflict injury on himself* to enhance the amount of his damages.⁹

¹ *Dale v. Brooklyn etc. R. Co.*, 1 Hun, 146; *s. c.* 3 Thomp. & C. 686.

² *Hopkins v. Atlantic etc. R. Co.*, 36 N. H. 9.

³ *McDonald v. Chicago etc. R. Co.*, 26 Iowa, 124.

⁴ *Matteson v. New York etc. R. Co.*, 62 Barb. 364; *Pittsburgh etc. R. Co. v. Andrews*, 39 Md. 329.

⁵ *McDonald v. Chicago etc. R. Co.*, 26 Iowa, 124; *The D. S. Gregory*, 2 Ben. 226 (affirmed in 9 Wall. 513).

⁶ "We apprehend, when the facts are known, it is the province of the court to say for what matters damages are to be given; but the amount of damages is a question for the jury quite as much as the credit due to

the witnesses." Pollock, C. B., in *Wilson v. Newport Dock Co.*, 4 Hurl. & Colt. 232; *s. c.* L. R. 1 Exch. 177; 12 Jur. (N. S.) 233. See also *Blackburn, J.*, in *Hobbs v. London etc. R. Co.*, 44 L. J. (Q. B.) 49, 53; *s. c.* L. R. 10 Q. B. 111; 23 Week. Rep. 520; 32 L. T. (N. S.) 352. "The right to damages is a question of law for the court. The facts are for the jury." *Tarbell, J.*, in *Memphis etc. R. Co. v. Whitefield*, 44 Miss. 466, 499.

⁷ *Baltimore etc. R. Co. v. Blocher*, 27 Md. 277; *Montgomery etc. R. Co. v. Boring*, 51 Ga. 582.

⁸ *Indianapolis etc. R. Co. v. Birney*, 71 Ill. 391.

⁹ *Indianapolis etc. R. Co. v. Birney*, 71 Ill. 391.

Notes.

In another case, the defendant, a common carrier of passengers, contracted to take the plaintiff, a young lady, from a railroad depot to her home, but, before arriving there, set her down in the city, a mile from her residence, on the sidewalk of a frequented street on which ran a line of street cars which passed within a square of her house. It was on a dry but very cold winter day. The plaintiff was of a delicate constitution, though not sick at the time. Being warmly clad, she walked home in company with a friend, but in doing so contracted a cold which permanently injured her health. It was held that the injury was too remote, and the contributory negligence of the plaintiff too direct, to warrant a recovery for her sufferings, loss of employment, and permanent injury to health; that her recovery must be limited to the reasonable cost of a conveyance home, and her expenses in endeavoring to avoid exposure to the cold.¹

In a recent English case,² the rule seems to have been applied with unnecessary rigor. The evidence showed that, through the negligence of the servants of the defendant, a railway company, the plaintiffs (husband and wife) and their two children were taken to the wrong station, where they could obtain neither accommodation nor a conveyance; consequently they were obliged to walk several miles, in the middle of a wet night. The female plaintiff caught cold and was sick for some time, and unable to assist her husband in his business. The sickness made medical attendance and other expenses necessary. The plaintiffs recovered £10 for the personal inconvenience suffered under these circumstances, and £20 in respect of the wife's illness. On appeal, it was held that the plaintiffs could not recover damages for the illness of the wife or the losses in consequence, such damage being too remote, and not flowing immediately from the cause of action. COCKBURN, C. J., thus expressed the difficulty he had in coming to a decision and laying down a rule as to the measure of damages in actions of this kind: "The nearest approach to a definition, it seems to me, is, that to entitle a person to damages for a breach of contract the injury for which compensation is asked should be one that may be taken to have been in the contemplation of the parties as fairly the consequence that might arise from the breach, or as fairly flowing from it, and not merely connected through a series of intermediate causes between the breach and the injury complained of." MELLOR, J., in the same case, stated the rule thus: "The damage which, as a matter of law, must be construed as a measure of damages is such as arises naturally and directly from the breach of contract, or such as both parties might reasonably have expected to result from a breach of the contract." COCKBURN, C. J., also said: "As to walking home, it must be in the contemplation of the parties that passengers put down at a wrong place will have to get home. If there are means of doing so they must avail themselves of them, and the company are responsible for the cost incurred; if there are no such means, the company are responsible, and must compensate for the inconvenience which the absence of means causes. But in the case of the cold caught, that cannot stand on the same footing." He then gives the two following hypothetical cases, which he claimed to be analogous to the case at bar: "The party aggrieved would in like manner be entitled to recover as where in walking home in the

¹ Francis v. St. Louis Transfer Co., 5 Mo. App. 7.

² Hobbs v. London etc. R. Co., 44 L. J. (Q. B.) 49; s. c. 23 Week. Rep. 520; 32 L. T. (N. S.) 352; L. R. 10 Q. B. 111.

Should not be conjectural.

dark a false step is taken which results in a fall and a broken limb. In that case the damage would be too remote, not being a consequence which could reasonably be anticipated to follow from a breach of contract, as a person might walk many times from Esher to Hampton without such an occurrence. Or, again, persons are entitled under such circumstances to take a carriage; suppose that done, and the carriage to be overturned and the person to sustain a bodily injury, it may be said that if this person had been put down at the right place he would not have had to walk or ride, and so could have met with neither accident; but still the injury is too remote. That, I think, is the case here; it is not the necessary, not even the probable, consequence of this breach of contract that personal injury should be sustained or a cold caught. That cannot be reasonably expected, and so to have been within the contemplation of the parties; in other words, too remote." The foregoing language would seem to be open to criticism. It may be true that the taking of a false step resulting in a broken limb, or a bodily injury from the overturning of a carriage in attempting to reach his destination, are not consequences which could reasonably be anticipated to follow from setting a passenger down at the wrong station; but that a female passenger might become sick, when compelled to walk several miles on a wet night, is a consequence reasonably to be anticipated to follow such a breach of the contract of carriage as in this case, and is such as may be taken to have been in the contemplation of the parties as fairly flowing from it.¹

It must be considered as in the contemplation of the parties that if, in the breach of the contract of carriage, the passenger is placed in such a position that his health is endangered, either by reason of the nature of the exposure, or on account of his feebleness of body, his age, or his being unacclimated, sickness will probably ensue, causing damage to him. Thus, the defendant, a common carrier of passengers, contracted to carry the plaintiff from New York City to San Francisco by way of Nicaragua, but in consequence of the wrecking of the vessel which was to carry him from San Juan del Sur, on the Pacific coast, to San Francisco, he was detained for several weeks upon the Isthmus of Nicaragua, where he became sick with a fever peculiar to that climate and remained sick until long after his arrival in New York City, to which place he was obliged to return. Under these circumstances, it was held proper to receive evidence as to exposure to sun and rain while crossing the isthmus, and the unhealthiness of the climate; furthermore, that damages should be allowed for loss of time by reason of detention on the isthmus, for his expenses there and the expenses of his return to New York, the time he lost by reason of his sickness after he returned home, and the expense of such sickness.² Again, where an aged woman was put off in the night-time, at a station upon the defendant's road which was neither open nor lighted and where there was no one to give her information as to where she might obtain shelter, and she wandered away from the depot in search of the highway, and returning, about an hour afterwards, fell down a flight of steps on the premises, it was held—it being assumed that the absence of any light at the depot, or of any person to give information,

¹ Compare *Patten v. Chicago etc. R. Co.*, 32 Wis. 524.

Williams v. Vanderbilt, 23 N. Y. 217 (over-

ruling *Briggs v. Vanderbilt*, 19 Barb. 222, and *Bonsteel v. Vanderbilt*, 21 Barb. 26). See also *Ward v. Vanderbilt*, 34 How. Pr. 144.

Notes.

was negligence on the part of the company—that it was proper to submit the question to the jury whether such negligence was the proximate cause of the injury.¹

The refusal of the carrier to receive a passenger,² carrying him beyond his destination,³ detaining him unnecessarily during his journey,⁴ or carrying off a person against his will who is legitimately upon a vessel,⁵ are all wrongs which may be redressed by actions for damages thereby sustained. Damages, it seems, may be awarded for the refusal of the carrier to further transport a passenger after it has come to his knowledge that any other course would result in loss of life of the passenger or be hazardous to his safety. The novel case of *Pearson v. Duane*,⁶ which we have elsewhere presented in full,⁷ illustrates this point. The plaintiff was here persisting in a course of “sheer madness,” as the court termed it, which was checked by the refusal of the defendant to convey him further. It was held, nevertheless, that in such a case the apprehended danger only mitigated the act; that the passenger was entitled to compensation for the injury done him by being put on board the return vessel, so far as that injury arose from the act of the captain in putting him there; but that he was not entitled to damages for injuries he suffered from obstructions which he afterwards met with in reaching San Francisco, which injuries were not caused by the captain’s act, but were due to the fact that all to whom he afterwards applied for passage to that place knew the power and determination of the authorities there and were afraid to carry him back. The court below having awarded \$4,000 damages, this judgment was modified by allowing but \$50, with directions that each party should pay his own costs on the appeal.

In an English case,⁸ it appeared that the plaintiff, a person in business, travelling to meet his customers, booked himself by the defendants’ railway as a passenger from London to Hull by a train which the defendants advertised to arrive at Hull the same night. On reaching Grimsby, where the defendants’ line ended, it was found that the Hull train had left, and although the plaintiff might have reached Hull that night by taking a special conveyance, he remained at Grimsby and proceeded by train the next morning; but he was too late to reach certain places by the hour he had previously appointed for meeting his customers, and in consequence he was obliged to hire conveyances to see some of his customers elsewhere, and was detained several days waiting for the market-days to see others. It was held that he was only entitled to recover damages to the amount of his hotel expenses at Grimsby and the railway fare the next day to Hull, and was not entitled to recover for any damages whatever occasioned by his not reaching the places where he had engagements to see his customers, by the time he might have reached them if the defendants had performed their contract.

Evidence of loss sustained by the plaintiff in his business in consequence of a personal injury is proper, to aid the jury in estimating the plaintiff’s damages;

¹ *Patten v. Chicago etc. R. Co.*, 32 Wis. 524.

² *Heirn v. McCaughan*, 32 Miss. 17; *The Zenobia*, 1 Abb. Adm. 80.

³ *Porter v. Steamboat New England*, 17 Mo. 290; *The Canadian*, 1 Brown’s Adm. 11; *Thompson v. New Orleans etc. R. Co.*, 50 Miss. 315.

⁴ *Yonge v. Pacific Mail Steamship Co.*, 1 Cal. 353.

⁵ *Stoneseifer v. Sheble*, 31 Mo. 243.

⁶ 4 Wall. 605.

⁷ *Ante*, p. 17.

⁸ *Hamlin v. Great Northern R. Co.*, 26 L. J. (Exch.) 20; s. c. 1 Hurl. & N. 408.

Should not be conjectural.

and for that purpose the nature of the plaintiff's business, its extent, and the importance of his personal oversight and superintendence in conducting it, may be shown.¹ Thus, the plaintiff, a lawyer, was struck by a bar of iron which projected from a construction-train passing the car in which he sat. The injuries resulting from this blow were of a painful and permanent nature, some of the important effects of which would probably continue during life and sensibly abridge the period of the same. The plaintiff was in early manhood, engaged in an extensive practice, which was impaired by his subsequent inability to give it the requisite attention, and he was afflicted with bodily derangements that measurably unfitted him for the duties of his profession. It was held that, the object of the law being fairly to compensate a party injured through the negligence of another, the pecuniary losses resulting from the plaintiff's inability to attend to his business formed a proper item of damages, and that, under the circumstances of the case, the court had no data from which it could say that a verdict of \$20,000 for the plaintiff was too much.²

In another case,³ it was held to be error to instruct a jury that they would be justified in taking into consideration "the bodily pain and suffering which the plaintiff suffered, or *was likely to suffer*, in consequence of the neglect of the defendants;" that the instruction authorized an allowance of damages for future pain which is rendered probable merely; that damages are to be proved, and none are to be allowed except such as are shown by the proof to be at least to a reasonable degree certain. But it was further held that there would be no objection to the charge when modified by the instruction "that future damages could only be awarded when it was reasonably certain, from the evidence, that such damages would inevitably and necessarily result from the original injury."

Where the plaintiff, a book-keeper, in violation of the agreement of the defendants, was detained at New Orleans and Panama, on his way to California, an unreasonable length of time, it was held improper to charge that the measure of damages would be the wages of a book-keeper during the period of the detention, at the then rate in San Francisco. It should have been left to the jury to weigh the probabilities of his procuring employment in San Francisco immediately upon his arrival, and of such employment being continued during the entire period in question.⁴ In an action against a carrier of passengers to recover damages for a failure to carry the plaintiff within the appointed time to the place for which he had taken passage, by reason whereof he was unable to perform his errand there and was detained at expense, and to the injury of his business at home, it was held that he must produce some evidence that if he had arrived at the appointed time he might have done his errand and would have promptly returned, or that he could not with due effort accomplish his errand by reason of his delay in arriving. Nor could the plaintiff in such an action recover his expenses and the damages to his business during a sojourn of several days, without some proof as to the time when he first ascertained that he could not accomplish his errand and might therefore return. The fact that his errand was to receive a loan of money previously promised to him, and that, not receiving it, he was without money for the

¹ *Lincoln v. Saratoga etc. R. Co.*, 23 Wend. 425.

² *Walker v. Erie R. Co.*, 63 Barb. 260.

³ *Curtis v. Rochester etc. R. Co.*, 18 N. Y. 534 (affirming *s. c.* in 20 Barb. 282).

⁴ *Yonge v. Pac. Mail Steam. Co.*, 1 Cal. 353.

Notes.

expenses of returning until he received it from home, is not sufficient to show a necessity for delaying his return, if he made no effort to borrow means and did not show that there was difficulty in doing so.¹

Where the conductor of the defendants' train unreasonably ordered the plaintiff, a passenger, to leave the train, and upon refusal placed his hand upon the plaintiff's shoulder to compel him to go, and the plaintiff rose from his seat and followed the conductor out of the car, but in so doing slipped and fell upon the car steps and was injured, it was held that the injuries caused by the fall were not elements to be taken into consideration in estimating the damages he might recover for being wrongfully ejected from the train.²

In a case³ where it appeared that the plaintiff contracted with the master of a vessel in a foreign port for passage to this country, and paid a part of his passage-money in advance, but the master failed to fulfil his contract and the plaintiff was obliged in consequence to take passage in another vessel, it was held that he was entitled to recover the passage-money paid, and the expenses incurred by him in awaiting the sailing of another ship. So, the master of a schooner who had taken passage on a steamer to rejoin his vessel and was carried past his destination, was held entitled to recover not only for his personal expenses and loss of time, but damages in the nature of demurrage for the detention of his vessel, which was awaiting his return.⁴

In an action against a railroad company for a failure to furnish passenger-cars as agreed upon for an excursion, at a stipulated price, the measure of recovery would be the amount the plaintiff would have received as passage-money if the train had gone as proposed, less the amount agreed to be paid for the use of the cars.⁵

§ 22. The same Rules as to the Measure of Damages apply to Corporations as to Individuals.—The rule as to the computation of damages for injuries inflicted upon a passenger by a carrier which is a corporate body is the same as where the carrier is a natural person. There is no rule of public policy requiring a greater or different compensation from that which would be due from an individual under like circumstances.⁶

§ 23. Elements of Damage.—In estimating compensatory damages in the class of actions we are considering, the jury may take into consideration, as elements, loss of time,⁷ inability to attend to business,⁸ pecuniary expenses,⁹

¹ *Benson v. New Jersey etc. Transp. Co.*, 9 Bosw. 412.

² *Williamson v. Grand Trunk R. Co.*, 17 Upper Canada C. P. 615.

³ *The Zenobia*, 1 Abb. Adm. 80.

⁴ *The Canadian*, 1 Brown's Adm. 11. See also *Porter v. The New England*, 17 Mo. 290.

⁵ *Illinois etc. R. Co. v. Demars*, 44 Ill. 292.

⁶ *Illinois etc. R. Co. v. Nelson*, 59 Ill. 110.

⁷ *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339. There need not necessarily be evidence of the value of the time lost, in order to recover therefor. *Ward v. Vanderbilt*, 4 Abb. App. Dec. 521.

⁸ *McKinley v. Chicago etc. R. Co.*, 44 Iowa, 314; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339; *Walker v. Erie R. Co.*, 63 Barb. 260.

⁹ *The Canadian*, 1 Brown's Adm. 11; *Indianapolis etc. R. Co. v. Birney*, 71 Ill. 391; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7.

Elements of.

bodily pain,¹ any incurable hurt² (as where mental faculties are impaired),³ personal inconvenience,⁴ and mental anguish caused by bodily pain.⁵

Whether mental anguish caused neither by fear nor bodily injury — such, for example, as arises from the indignity of ejection from a train without violence — is an element of *compensatory* damages, is a question upon which the authorities are not fully agreed.⁶ It is said: "How can such damages be estimated in money? The mental agony of a timid woman would be entirely different from that of a bold man. No two cases could be weighed in like scales. To properly estimate such a cause of damage, the door must be opened to the realms of philosophy, physiology, and psychology."⁷ But the same remarks would apply to damages awarded for bodily pain. That injuries done can have no adequate redress in money, or that damages may be difficult of estimation, is no reason why pecuniary relief may not be granted as a compensation.

§ 24. Continued — Wealth of Defendant — Circumstances of Plaintiff — Disfigurement of Person — Character of Plaintiff — Expense of Litigation — Value of Gratuitous Nursing. — In an action for compensation for injuries where there is no evidence of wilful negligence or malice the wealth or poverty of the defendant cannot be taken into consideration.⁸ It would be of no value in estimating the actual damages the plaintiff had sustained. But it is often necessary to inquire into the plaintiff's condition in life, his habits, pursuits, and necessities, in order to determine what actual damage he has sustained; and, where pleaded, evidence of that nature may be received.⁹ Thus, where damages were claimed for the disfigurement of the plaintiff's face, the fact that she was "a plain girl, moving in an humble walk in life," was taken into consideration

¹ *Klein v. Jewett*, 26 N. J. Eq. 474; *McKinley v. Chicago etc. R. Co.*, 44 Iowa, 314, 319; *Morse v. Auburn etc. R. Co.*, 10 Barb. 621; *Ohio etc. R. Co. v. Dickerson*, 59 Ind. 317; *Whalen v. St. Louis etc. R. Co.*, 60 Mo. 323; *Ransom v. New York etc. R. Co.*, 15 N. Y. 415; *Curtis v. Rochester etc. R. Co.*, 20 Barb. 282 (affirmed in 18 N. Y. 534). See *Pennsylvania R. Co. v. Allen*, 53 Pa. St. 276. And see *Theobald v. Railway Passengers' Ass. Co.*, 10 Exch. 45; *s. c.* 26 Eng. Law & Eq. 432.

² *Whalen v. St. Louis etc. R. Co.*, 60 Mo. 323; *Pittsburgh etc. R. Co. v. Andrews*, 39 Md. 329.

³ *Toledo etc. R. Co. v. Baddeley*, 54 Ill. 19.

⁴ *Hobbs v. London etc. R. Co.*, L. R. 10 Q. B. 111; *s. c.* 44 L. J. (Q. B.) 49; 23 Week. Rep. 520; 32 L. T. (N. S.) 352.

⁵ *Pittsburgh etc. R. Co. v. Andrews*, 39 Md. 329; *Memphis etc. R. Co. v. Whitfield*, 44 Miss. 466; *Johnson v. Wells*, 6 Nev. 224; *Muldorney v. Illinois etc. R. Co.*, 36 Iowa, 462; *Fairchild v. California Stage Co.*, 13 Cal. 599.

⁶ The following authorities seem to hold the affirmative: *McKinley v. Chicago etc. R. Co.*, 44 Iowa, 314; *Chicago etc. R. Co. v.*

Flagg, 43 Ill. 364; *Craker v. Chicago etc. R. Co.*, 36 Wis. 657; *Ransom v. New York etc. R. Co.*, 15 N. Y. 415; *Sherley v. Billings*, 8 Bush, 147; *Paine v. Chicago etc. R. Co.*, 45 Iowa, 569; *Hamilton v. Third Avenue R. Co.*, 53 N. Y. 25; *s. c.* 48 How. Pr. 50. See *Colebridge, J.*, in *Blake v. Midland R. Co.*, 18 Q. B. 93; *s. c.* 21 L. J. (Q. B.) 233; 16 Jur. 562; 10 Eng. Law & Eq. 437; *s. p.* *Masters v. Warren*, 27 Conn. 233; *Seger v. Burkhamsted*, 22 Conn. 290; *Canning v. Williamstown*, 1 Cush. 451. See *contra*, *Johnson v. Wells*, 6 Nev. 224 (overruled in *Quigley v. Central Pacific R. Co.*, 11 Nev. 350); *Smith v. Pittsburgh etc. R. Co.*, 23 Ohio St. 10.

⁷ *Whitman, J.*, in *Johnson v. Wells*, 6 Nev. 224, 232.

⁸ *Caldwell v. Murphy*, 1 Duer, 233. In a case which will warrant the infliction of exemplary damages, the wealth of the defendant may be taken into consideration. *New Orleans etc. R. Co. v. Hurst*, 36 Miss. 660.

⁹ *Laing v. Colder*, 8 Pa. St. 479; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339; *Winters v. Hannibal etc. R. Co.*, 39 Mo. 468. But see *Stockton v. Frey*, 4 Gill, 406.

Notes.

in fixing the amount.¹ But it is said that the character of the passenger cannot be considered as an element in estimating the amount of damages.² Unless the case be such as to warrant exemplary damages, the jury are not allowed to take into consideration the probable expenses of litigation, beyond the taxable costs and counsel-fees.³ The value of nursing gratuitously bestowed upon a passenger injured by an accident to a vessel upon which she was travelling has also been held an element of damages.⁴

§ 25. Continued — Damages which may be recovered by Husband and Wife jointly suing — Recovery by Father for Injury to Child. — In an action against a passenger-carrier by a husband and wife for injuries received by the wife, damages for her personal injury and suffering may be recovered, but the loss of income from her incapacity to labor, and the expenses of her cure, must be recovered in an action brought by the husband alone.⁵ In Illinois, the wife can sue without joining her husband in such an action.⁶ But the shock to the feelings of the husband or parent cannot enter as an element of damages in a suit for injuries received by the wife or child, — such damages being recoverable only by those who in their own proper persons are injured.⁷

§ 26. Mitigation of Damages. — The fact that one who is injured by a passenger-carrier continues to receive his salary from his employer during the time he is disabled by such injury cannot mitigate the damages that the injured person would otherwise be entitled to recover in an action therefor.⁸ Nor are the damages in such a case subject to any deduction by reason of money having been paid to the passenger by an insurance company, under a policy against accidents, as compensation for the same injury.⁹ The liability of a railroad company for a violent ejection of a passenger from its train is not diminished by the fact that he was at the time suffering from a disease which aggravated the injuries sustained or rendered them more difficult of cure.¹⁰ But when a passenger offered, without any explanation, a ticket which was void by reason of having been punched, and refused to pay his fare, for which he was ejected from the car three or four miles from a station, contrary to the Illinois statute, it was held that the attempt of the plaintiff to use such a ticket without explanation as to how he obtained it was evidence of wrong on his part, and must mitigate the damages which otherwise would be awarded.¹¹

In an action by a passenger for wrongful ejection from a railroad train, it

¹ The *Oriflamme*, 3 Sawyer, 397; s. c. 2 Cent. L. J. 473; 7 Ch. Leg. N. 347.

² *Johnson v. Wells*, 6 Nev. 224.

³ *Lincoln v. Saratoga etc. R. Co.*, 23 Wend. 425; *New Orleans etc. R. Co. v. Allbritton*, 38 Miss. 242; *The Oriflamme*, 3 Sawyer, 397; s. c. 2 Cent. L. J. 473; 7 Ch. Leg. N. 347.

⁴ *The D. S. Gregory*, 2 Ben. 226.

⁵ *Klein v. Jewett*, 26 N. J. Eq. 474; *Hopkins v. Atlantic etc. R. Co.*, 36 N. H. 9. In Iowa, the common-law rule as stated in the text is changed by statute. Expenses of her cure and damages for loss of her service may be recovered in an action brought

in the name of both. *McDonald v. Chicago etc. R. Co.*, 26 Iowa, 124.

⁶ *Seymour v. Chicago etc. R. Co.*, 3 Biss. 43.

⁷ *Black v. Carrollton R. Co.*, 10 La. An. 33.

⁸ *Ohio etc. R. Co. v. Dickerson*, 59 Ind. 317.

⁹ *Bradburn v. Great Western R. Co.*, L. R. 10 Exch. 1; s. c. 44 L. J. (Exch.) 9; *Pittsburgh etc. R. Co. v. Thompson*, 56 Ill. 138.

¹⁰ *Brown v. Hannibal etc. R. Co.*, 66 Mo. 588.

¹¹ *Terre Haute etc. R. Co. v. Vanatta*, 21 Ill. 188.

Exemplary.

appeared that the rate of fare fixed by the company was higher than that allowed by law; that the plaintiff tendered the legal rate; that upon his refusal to pay more he was ejected from the cars, but without any rudeness or unnecessary violence; that at the time he took passage the plaintiff knew the rate established by the company, and expected to be ejected from the cars, intending to bring an action for such ejection, in order to test the right of the company to charge the established rate. Upon these facts, the plaintiff was held entitled to compensatory damages only, and the company was permitted, for the purpose of mitigating the damages, to give in evidence subsequent declarations of the plaintiff tending to prove that his object in taking passage on the cars was to make money by bringing suit against the company for demanding more than the statutory rate of fare.¹

§ 27. **Exemplary Damages.**—(1.) *May be awarded, when.*—Damages may be given in some cases, for injuries received by a passenger, to a greater amount than will compensate for the injury actually sustained.² Such damages are termed exemplary, punitive, or vindictive damages,—sometimes called “smart-

¹ *Cincinnati etc. R. Co. v. Cole*, 29 Ohio St. 126.

² Able writers have differed on the question whether exemplary damages may be given in any case. Prof. Greenleaf and Mr. Sedgwick have discussed it at length, and subsequent annotators of their respective works have taken up the discussion so ably carried on by these great authors in their controversy. Each cites a large number of authorities to sustain his position, and each apparently succeeds to his own satisfaction in proving that his views are correct. The position held by Prof. Greenleaf, as stated in his great work on Evidence (2 Greenl. on Ev., 13th ed., § 253—see note 2) is as follows: “Damages are given as a compensation, recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant. *They should be precisely commensurate with the injury, neither more nor less, and this whether it be to his person or estate.*” While Mr. Sedgwick, in his valuable treatise on the Law of Damages (Sedgw. on Dam., 6th ed., p. 38—see also chap. 18, p. 466, note 1), says: “Where either of these elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages, *not only to recompense the sufferer, but to punish the offender.*” Theron Metcalf, then reporter of the State of Massachusetts, and

since judge of the Supreme Court of that State (3 Am. Jur. 287-313), and Chancellor Kent (2 Kent's Comm., 12th ed., pt. 4, § 24, p. 15, note a) take opposite sides on this question, and numerous judges and text-writers have noticed the controversy. See *Fay v. Parker*, 53 N. H. 342, where the question is considered at length, and numerous authorities on the subject are reviewed. The question, however, may be considered as settled; the current of authority at the present time being in accord with the principle stated in the text. “It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment given to the party injured.” Grier, J., in *Day v. Woodworth*, 13 How. 363, 371. See also *Phila. etc. R. Co. v. Quigley*, 21 How. 202, 213; *Milwaukee etc. R. Co. v. Arms*, 91 U. S. 489; *Memphis etc. R. Co. v. Whitfield*, 44 Miss. 466; *Hopkins v. Atlantic etc. R. Co.*, 36 N. H. 9.

Notes.

money,"—and are only awarded in cases where there is an element either of fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness, or other causes of aggravation in the act or omission causing the injury. They are inflicted as a punishment to the wrong-doer and as an example to others.¹ Some of the authorities include "gross negligence" on the part of the defendant as one of the elements which, mingling in the wrongful act complained of, entitles the plaintiff to exemplary damages.² But the better view is given in an opinion delivered in a recent case in the Supreme Court of the United States.³ This was an action brought for damages sustained by a lady passenger on a train at the time when a collision occurred. The train, while running at a speed of fourteen or fifteen miles an hour, collided with another train moving in an opposite direction on the same track. The jar occasioned by the collision was light, and more of a push than a shock. The fronts of the two engines were demolished, and a new engine removed the train. This was all the testimony offered by either party as to the character of the collision, and the cause of it; but there was evidence tending to show that the lady was thrown from her seat, and sustained the injuries of which she complained. The trial court gave the following instruction: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give the plaintiffs punitive or exemplary damages." In reversing the case, Mr. Justice DAVIS, who delivered the opinion of the Supreme Court, said: "Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence.⁴ Lord CRANWORTH, in *Wilson v. Brett*,⁵ said that gross negligence is ordinary negligence with a vituperative epithet; and the Exchequer Chamber took the same view of the subject.⁶ In the Common Pleas, *Grill v. General Iron Screw Collier Company*⁷ was heard on appeal. One of the points raised was the supposed misdirection of the LORD CHIEF JUSTICE who tried the case, because he had made no distinction between gross and ordinary negligence. Mr. Justice WILLES, in deciding this point, after stating his agreement with the *dictum* of Lord CRANWORTH, said: 'Confusion has arisen from regarding "negligence" as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. "Gross" is a word of description, and not of definition; and it would have been only introducing a source of confusion to use the expression "gross negligence" instead of the equivalent, — a want of due care and skill in navigating the vessel, — which was again and again used by the LORD CHIEF JUSTICE in his summing up.' 'Gross negligence' is

¹ *Heirn v. McCaughan*, 32 Miss. 17; *New Orleans etc. R. Co. v. Hurst*, 36 Miss. 660; *Graham v. Pacific R. Co.*, 66 Mo. 536; *New Orleans etc. R. Co. v. Statham*, 42 Miss. 607; *Peck v. Neil*, 3 McLean, 22; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Chicago etc. R. Co. v. Williams*, 55 Ill. 185. In *The D. S. Gregory*, 2 Ben. 226, 240, the judge says: "I allow nothing for exemplary, punitive, or vindictive damages. The case is not one of malicious or wilful injury, although it is

one of reckless negligence, and is not a proper case for exemplary damages."

² *Frink v. Coe*, 4 Greene (Iowa), 555; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *Hopkins v. Atlantic etc. R. Co.*, 36 N. H. 9.

³ *Milwaukee etc. R. Co. v. Arms*, 91 U. S. 489.

⁴ *Redf. on Car.*, § 376.

⁵ 11 Mee. & W. 113.

⁶ *Beal v. South Devon R. Co.*, 3 Hurl. & Colt. 337.

⁷ L. R. 1 C. P. 600.

Exemplary — Corporations liable.

a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence;' but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury."¹

(2.) *When Corporations are liable.* — There is no doubt that corporations, like individuals, may be liable in a proper case for exemplary damages.² Some of the authorities, however, hold that there must be either an authorization or ratification of the act complained of, by the corporation, to warrant the infliction of more than compensatory damages.³ In the language of one of the authorities: "Where a railroad company adopts all rules and regulations needful for the safety of the passengers, and employs competent agents whose duty it is to see that these rules and regulations are observed, I do not think that the company, in case of injury to the passengers, happening by reason of the failure of the agent to perform this duty, can be held liable for punitive damages. If, however, the company, as such, is in fault, a different rule applies. The company, for its own carelessness, may be justly held liable for smart-money."⁴ Others hold that slight acts will be sufficient to indicate ratification, — such as retaining in the service of the company the employee whose act caused the injury, after knowledge of the act by the officers of the corporation.⁵

But the rule which is in accord with reason and the weight of authority is that passenger-carriers, although corporations, may be liable, in a proper case, in exemplary damages for injuries to passengers caused by their agents, without a direct authorization or subsequent ratification of the act complained of. In a recent opinion on this subject, it is said of the servants of a corporation: "They act on the peril of the corporation and their own. Indeed, as that fictitious

¹ See also *Western Union Tel. Co. v. Eyser*, 91 U. S. 495, note; *Kentucky etc. R. Co. v. Dills*, 4 Bush, 593; *Quigley v. Central Pacific R. Co.*, 11 Nev. 350; *McKeon v. Citizens' R. Co.*, 42 Mo. 79; *Doss v. Missouri etc. R. Co.*, 59 Mo. 27; *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Thompson v. New Orleans etc. R. Co.*, 50 Miss. 315; *Hill v. New Orleans etc. R. Co.*, 11 La. An. 292; *Toledo etc. R. Co. v. Patterson*, 63 Ill. 304; *Pullman etc. Co. v. Reed*, 75 Ill. 125; *Seymour v. Chicago etc. R. Co.*, 3 Biss. 43; *Du Laurans v. St. Paul etc. R. Co.*, 15 Minn. 49; *Hamilton v. Third Avenue R. Co.*, 53 N. Y. 25; *Paine v. Chicago etc. R. Co.*, 45 Iowa, 569; *Pittsburgh etc. R. Co. v. Slusser*, 19 Ohio St. 157. But see *Kansas Pacific R. Co. v. Kessler*, 18 Kan. 523.

² *Malecek v. Tower Grove etc. R. Co.*, 57 Mo. 17; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Pittsburgh etc. R. Co. v. Slusser*, 19 Ohio St. 157; *Atlantic etc. R. Co. v. Dunn*, 19 Ohio St. 162; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282. *Contra*, *Wardrobe v. California Stage Co.*, 7 Cal. 118.

³ *New Orleans etc. R. Co. v. Allbritton*, 38 Miss. 242; *Hagan v. Providence etc. R. Co.*, 3 R. I. 83; *Milwaukee etc. R. Co. v. Finney*, 10 Wis. 388 (overruled in *Craker v. Chicago etc. R. Co.*, 36 Wis. 657); *Turner v. North Beach etc. R. Co.*, 34 Cal. 694.

⁴ *Ackerson v. Erie R. Co.*, 32 N. J. L. 254, 260.

⁵ *Perkins v. Missouri etc. R. Co.*, 55 Mo. 201; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202.

Notes.

entity, the corporation, can act only through natural persons, its officers and servants, and as it of necessity commits its trains absolutely to the charge of officers of its own appointment, and passengers of necessity commit to them their safety and comfort *in transitu*, under conditions of such peril and subordination, we are disposed to hold that the whole power and authority of the corporation, *pro hac vice*, is vested in these officers, and that, as to passengers on board, they are to be considered as the corporation itself; and that the consequent authority and responsibility are not generally to be straitened or impaired by any arrangement between the corporation and the officers: the corporation being responsible for the acts of the officers in the conduct and government of the train, to the passengers travelling by it, as the officers would be for themselves if they were themselves the owners of the road and train."¹

Another authority says: "We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation, or the malice of the servant and the malice of the corporation, or the punishment of the servant and the punishment of the corporation, is sheer nonsense, and only tends to confuse the mind and confound the judgment. * * * It is our judgment, therefore, that actions against corporations for the wilful and malicious acts of their agents and servants in executing the business of the corporation should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is the most needed."²

(3.) *Questions of Law and Questions of Fact.*—In actions for neglect of duty whereby passengers are injured, the jury are the sole judges as to the *existence* of facts showing that the act complained of was attended with circumstances of aggravation; but what elements must form a part of the transaction to warrant the finding of exemplary damages is a question of law.³

§ 28. **Excessive Damages**—When Appellate Courts will reverse Judgments on account of.—In actions for injuries to passengers, where there is no fixed rule of compensation, courts are loath to set aside the verdicts of juries or to

¹ Bass v. Chicago etc. R. Co., 36 Wis. 450; s. c. ante, p. 311.

² Goddard v. Grand Trunk R. Co., 57 Me. 202, 223. See also Hanson v. European etc. R. Co., 62 Me. 84; Chicago etc. R. Co. v. Herring, 57 Ill. 59; Jeffersonville R. Co. v.

Rogers, 38 Ind. 116; Baltimore etc. R. Co. v. Blocher, 27 Md. 277; Quigley v. Central Pacific R. Co., 11 Nev. 350.

³ Jackson v. Second Avenue R. Co., 47 N. Y. 274; Southern R. Co. v. Kendrick, 40 Miss. 374.

Wrongfully ejecting Passengers.

reverse judgments founded thereon, simply because the damages awarded seem excessive. In a recent New York case¹ the court say: "Even if it was clear that the damages were excessive, it is not the province of this court to interfere on any such ground." But if the damages are so manifestly unjust and disproportionate as to show that the jury have been misled either by passion, prejudice, partiality, or misapprehension, the courts will usually interfere.² The following instances of the action of courts, either in reversing judgments or refusing to interfere on this ground, will afford illustration of the foregoing:—

§ 29. Illustrations.—(1.) *For wrongfully ejecting Passenger.*—A passenger paid for a railroad ticket to a certain station, but through inadvertence received a ticket to an intermediate point, and refused to pay the extra fare (only twenty cents) subsequently demanded. He also refused to leave the train, so that he had to be put off by force, but immediately got on board another coach, agreeing to pay the sum demanded. While making change, the passenger used grossly profane and obscene language in the presence of ladies, for which he was again forcibly expelled, no more force being used at either time than was necessary to overcome his resistance. A verdict of \$1,500 was held to be grossly excessive, and out of all proportion to the injury inflicted upon him other than what was attributable to his own misconduct.³ A passenger who had purchased a ticket for a particular berth in a sleeping-car, and lost the same, gave satisfactory assurance that he had purchased such ticket, but was nevertheless wrongfully expelled from the sleeping-car, but without circumstances of indignity, the conductor having only an honest purpose to execute a reasonable rule of the company. Three thousand dollars was held to be grossly excessive damages for this conduct, as the case showed only an honest difference of opinion between the conductor and passenger, and that the latter might have kept his berth by paying the sum of \$1.50. The passenger was therefore held to be entitled to recover only the price paid for the lost ticket, and a reasonable compensation for the inconvenience suffered by being deprived of his berth in the sleeping-car.⁴

The conductor of a railroad train took up the ticket of a passenger, giving him no check in return, and when within a few miles of such passenger's destination, accused him of attempting to ride beyond the distance for which he had paid, charged him with falsehood, treated him insolently in the presence of the other passengers, seized and put him off the train in a rude and angry manner at a place where there was no station or house, it being cold and dark and about nine o'clock at night. A verdict of \$700 for the plaintiff was held not excessive.⁵

A passenger who had purchased a first-class ticket began his journey upon a train composed of freight and passenger cars. A regular passenger-train over-

¹ *Maher v. Central Park R. Co.*, 67 N. Y. 52, 56 (affirming *s. c.* 7 Jones & Sp. 155).

² *Terre Haute etc. R. Co. v. Yanatta*, 21 Ill. 188; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Union Pacific R. Co. v. Hand*, 7 Kan. 380; *Missouri etc. R. Co. v. Weaver*, 16 Kan. 456; *New Orleans etc. R. Co. v. Hurst*, 36 Miss. 660; *New Orleans etc. R. Co. v. Statham*, 42 Miss. 607; *Du Laurans v. St. Paul etc. R. Co.*, 15

Minn. 49; *Georgia etc. R. Co. v. McCurdy*, 45 Ga. 288; *Montgomery etc. R. Co. v. Boring*, 51 Ga. 582; *Collins v. Albany etc. R. Co.*, 12 Barb. 492; *Clapp v. Hudson River R. Co.*, 19 Barb. 461; *Farish v. Reigle*, 11 Gratt. 697.

³ *Chicago etc. R. Co. v. Griffin*, 68 Ill. 499.

⁴ *Pullman etc. Co. v. Reed*, 75 Ill. 125.

⁵ *Indianapolis etc. R. Co. v. Milligan*, 50 Ind. 392.

Notes.

took this train at one of the stations, and in order the sooner to arrive at his destination, the passenger decided to finish his journey upon such train. The conductor of the first train assured the passenger that the check which he had received in exchange for his ticket would be received by the conductor of the other train as a ticket to his destination. But this conductor refused to accept it, and upon the refusal of the passenger to pay his fare, caused him to be forcibly ejected, at night, where there was no station and no house. When the train upon which the passenger had originally embarked came along, he was taken upon it and carried to his destination. It was held that a verdict, in an action for damages against the company, for \$400 was not excessive.¹

The plaintiff had shipped upon the defendants' railroad a car-load of stock and received from the railroad company what was called a "stock pass," and upon his return trip, the pass, though unexpired, was not honored and his fare was demanded. Refusing to pay, he was ejected from the train, without force, between five and six o'clock in the evening, at a station within a mile of the stock-yards where he had boarded it. He walked back to the stock-yards, purchased a ticket, and was carried on one of the company's trains to his destination on the following morning. It also appeared that the weather was cold, with snow on the ground; that it was dark at the time he was put off the train; that he had about \$400 on his person, and was made sick by becoming overheated; was afterwards feeble and unable to do much work for two or three months; but that the conductor who ejected him was acting under the belief that he was not authorized to receive the pass. The judgment given in the case, on a verdict of \$800, was affirmed.²

The plaintiff bought a ticket, and upon presenting it to the conductor it was taken up; but the conductor refused to allow him to ride without paying his fare again, because the agent at the station where he had boarded the train had informed the conductor that the plaintiff had procured the ticket without paying for it. The plaintiff was accordingly ejected from the train at a point over a quarter of a mile from the station where he had started, no more force being used than was necessary for the purpose; and the plaintiff was delayed only one day, and compelled to buy another ticket at an expense of \$40.50. A verdict of \$5,000 was held to be so excessive as to indicate passion and prejudice on the part of the jury.³ It was shown that the plaintiff tendered the conductor of the defendant's train fifty cents for his fare to his destination; that the conductor took the money, but demanded ten cents more because the passenger had not procured a ticket before entering the car; that the plaintiff refused to pay the further sum demanded, and the conductor, although keeping the fifty cents, ejected him at the next station, which was not his place of destination. It was held that a verdict of \$500, while large, would not justify the appellate court in reversing the judgment.⁴

It appeared that a passenger was wrongfully expelled from a train at a place which was not a station, three miles from where he entered the cars; that in ejecting him he resisted, and that three of the company's employees overpowered him; that he remonstrated against being put off on the open prairie, and

¹ Toledo etc. R. Co. v. McDonough, 53 Ind. 250.

² Graham v. Pacific R. Co., 66 Mo. 536.

³ Quigley v. Cent. Pac. R. Co., 11 Nev. 350.

⁴ Du Laurans v. St. Paul etc. R. Co., 15 Minn. 49.

Wrongfully ejecting Passengers.

offered to pay his fare to the next station rather than be put off there; that after being put off he struck, or struck at, one of the brakemen who assisted in his ejection, whereupon the brakeman knocked him down, jumped upon him, and only desisted from the assault when recalled by the conductor to the train. The passenger was not permanently injured or disfigured. His mouth was cut, and he received two other wounds on his head. He was in poor health, and had been for four years. It was held that a verdict for \$5,000 was excessive.¹ A passenger was ejected from a train because the conductor was under the impression he had not given him his ticket. The place where he was ejected was three miles from the station where he had got on, but he was compelled to wait only four hours, when he took the next train to his destination. The conductor was under the impression that the passenger was trying to impose on him, but his conduct towards the passenger was neither violent nor harsh. It was held that a verdict of £50 was excessive, and a new trial was accordingly granted.²

(2.) *For Removal of a Passenger from a Train at a Place not a Regular Station.*—In some of the States there are statutes prohibiting the removal of a passenger from a train at other than a regular station, although the passenger has been guilty of conduct justifying expulsion. Such is the law of Illinois. In the following cases of unlawful expulsion the question as to excess of damages has received the attention of the courts of last resort: A passenger refused to pay the tariff rate, and was ejected from the train about eighty rods from a station, without violence or any aggravating circumstances. One thousand dollars was held to be grossly excessive, and a judgment therefor was reversed.³ A passenger offered, without explanation, a ticket which was void by reason of having been punched. He refused to pay his fare, and was ejected from the car, without any aggravating circumstances, three or four miles from a station. In this case also, \$1,000 was held to be such excessive damages as to require that the verdict be set aside.⁴

A passenger wantonly refused to pay his fare, simply insisting upon riding in the cars without paying. He was ejected at a point two miles distant from a regular station, but in a manner free from indignity, and was subjected to no other injury or inconvenience by the expulsion than that of being obliged to walk to the station. Such a person is not entitled to recover any more than nominal damages; therefore, in such a case, a recovery of a verdict for \$450 was considered excessive and a new trial was granted.⁵

A passenger on a freight-train was compelled to get off at night at a water-tank, about a quarter of a mile from a station, because he had no ticket, in consequence of a rule of the company whereby passengers were not allowed to travel on freight-trains without tickets. The passenger was lame, and carried two heavy bundles. In order to reach the station he had to cross a covered railway bridge on a narrow foot-path. Upon these facts, a verdict of \$100 was deemed not excessive.⁶ A passenger refused to pay his fare, but told the conductor he would get off if the train was stopped. Upon the train being stopped

¹ Missouri etc. R. Co. v. Weaver, 16 Kan. 456.

² Huntsman v. Great Western R. Co., 20 Upper Canada Q. B. 24. See also Hamilton v. Third Avenue R. Co., 48 How. Pr. 50.

³ Chicago etc. R. Co. v. Parks, 18 Ill. 460. See also Stephen v. Smith, 29 Vt. 160.

⁴ Terre Haute R. Co. v. Vanatta, 21 Ill. 188.

⁵ Chicago etc. R. Co. v. Roberts, 40 Ill. 503.

⁶ Chicago etc. R. Co. v. Flagg, 43 Ill. 361.

Notes.

at a distance of three or four miles from a station, he refused to get off, and was then ejected with some violence, — his face being scratched, and the skin slightly abraded in one or two places on his limbs. It was held that a verdict of \$1,000 was excessive, and the judgment was reversed.¹

A passenger was put off the cars at some distance from a station, for the reason that he had not procured a ticket before getting aboard. It appeared that the station was closed; that the passenger so informed the conductor, and offered to pay the regular fare, which was refused; that this was done in the night-time, and the passenger compelled to walk back to the station. It was held that, as the jury had found a verdict for \$250, and a *remittitur* of \$50 had been entered in the trial court, and judgment given for \$200, this sum was not excessive, and the judgment was affirmed.² In another case, where the facts were similar to those in the preceding case, and a verdict of \$500 was given, it was held by a majority of the court that the damages were excessive and that the judgment should be reversed.³

(3.) *For Refusal to admit Passenger to a Car—Colored Person.*—Where a colored woman was refused admittance to the “ladies’ car” solely on account of her color, and was directed to take a seat in another car, which was set apart for and mostly occupied by men, which she declined to do, insisting upon her right to be admitted to the ladies’ car, and the evidence justified the conclusion that a brakeman, in excluding her from the car, did so in a very rude manner, in the presence of several persons, it was held that a verdict of \$200 recovered by the woman against the railroad company was not excessive.⁴ But in a case where a colored woman hailed a passing street car, which the conductor refused to stop solely for the reason that the woman was colored, and the jury gave a verdict for \$500, such damages were held excessive.⁵ So, where it appeared that a colored woman signalled a street car to stop, and upon getting on the platform, was ejected with some violence by the conductor, at the hour of ten o’clock at night, but without any appreciable injury, and immediately afterwards was conveyed on another of the same company’s cars to her destination, a verdict for \$750 was held to be excessive, and the judgment thereon reversed.⁶

(4.) *For Assault upon Passenger by Carrier’s Servants.*—The Supreme Court of Wisconsin has adopted the rule that the plaintiff in cases of this kind is not entitled to exemplary damages against the principal for the malicious act of the agent, without proof that the principal expressly authorized or confirmed it. But this does not mean that in such cases the recovery against the principal for the tort committed by its agent is limited to mere pecuniary loss. On the contrary, a very liberal allowance was made in at least one case for mental suffering. A conductor of a railway train, after engaging in a short, bantering conversation with the plaintiff, a female passenger, seized and kissed her several times. The plaintiff made no desperate resistance, but the court thought that \$1,000 was no more than adequate compensation for the torture inflicted upon

¹ Chicago etc. R. Co. v. Peacock, 48 Ill. 253.

² Illinois etc. R. Co. v. Johnson, 67 Ill. 312.

³ Illinois etc. R. Co. v. Cunningham, 67 Ill. 316.

⁴ Chicago etc. R. Co. v. Williams, 55 Ill. 185.

⁵ Pleasants v. North Beach etc. R. Co., 34 Cal. 586.

⁶ Turner v. North Beach etc. R. Co., 34 Cal. 594.

For carrying beyond Destination.

her sensibilities. RYAN, C. J., said: "She was entitled to liberal damages for her terror and anxiety, her outraged feelings and insulted virtue, for all her mental humiliation and suffering."¹

In a Kentucky case,² the jury were instructed not to give exemplary damages, and accordingly rendered \$4,400 as compensatory damages in a case where the clerk of a steamboat unwarrantably assaulted a deck-passenger, a boy fifteen years of age, who suffered, among other injuries, the loss of an eye. The Court of Appeals held that these damages were not excessive.

A verdict of \$4,850 was sustained in a case where the assault was entirely unprovoked and without justification. The plaintiff suffered no personal injury, but was assailed by the defendant's brakeman in language coarse, profane, and grossly insulting, supplemented by terrible threats of personal violence. The plaintiff was a person in feeble health, and wholly unable to offer resistance, and the brutal servant was retained in the employ of the defendant after the occurrence.³ In another case, shortly afterwards decided by the same court,⁴ the plaintiff and the defendant's brakeman had a dispute in regard to the presence of a dog of the former in the passenger-car, which terminated in a slight struggle in which the brakeman was worsted. This difficulty had entirely ended, when the brakeman approached the plaintiff from behind and inflicted several blows upon his head and shoulders with a heavy iron stove-poker. There was testimony as to the result that "the external table of the [plaintiff's] skull was cracked, and his eyes badly affected, indicating danger of palsy of the optic nerve and the entire loss of its functions." Under these circumstances the Supreme Judicial Court did not feel justified in setting aside the verdict as excessive.⁵

Other cases show a disposition of courts to allow a liberal measure of damages under circumstances of this kind.⁶

(5.) *For carrying Passenger beyond his Destination.* — Two cases decided by the Supreme Court of Mississippi upon this point show the extravagant idea which juries are apt to entertain as to the proper measure of damages in actions against railway companies, — a sentiment sometimes shared in by courts. This was certainly the fact in one of these cases. In this case the jury gave damages to the amount of \$4,500 on account of the defendant conveying the plaintiff four hundred yards beyond the station at which they had agreed to carry him, and then compelling him to leave the cars against his remonstrance, and contrary to his request that they should back the cars to the station. The Supreme Court, in reviewing the proceedings in the court below, expressed their regret that the jury had not acted with more leniency, but did not feel at liberty to disturb the verdict.⁷ This case was subsequently criticised in a case where the

¹ *Craker v. Chicago etc. R. Co.*, 36 Wis. 657, 679.

² *Sherley v. Billings*, 8 Bush, 147.

³ *Goddard v. Grand Trunk R. Co.*, 57 Me. 202. In a very similar case, the Supreme Court of Missouri sustained a verdict of \$500 as damages. *Malecek v. Tower Grove etc. R. Co.*, 57 Mo. 17.

⁴ *Hanson v. European etc. R. Co.*, 62 Me. 81.

⁵ In each of the foregoing cases the jury

were not restricted in their findings to compensatory damages. The whole doctrine of exemplary damages was fully examined in *Goddard v. Grand Trunk R. Co.*, and its application allowed in that case and in *Hanson v. European etc. R. Co.*

⁶ *McKinley v. Chicago etc. R. Co.*, 44 Iowa, 311; *Bryant v. Rich*, 106 Mass. 180.

⁷ *New Orleans etc. R. Co. v. Hurst*, 36 Miss. 660.

Notes.

plaintiff, a person in ill-health, was unable to get off the cars when they stopped at his destination, although they remained stationary the usual length of time. The conductor having been notified that the plaintiff had not succeeded in alighting, again stopped the train. This time the car in which the plaintiff was riding was distant only about sixty feet from the platform of the station. No request was made to back the car to the platform. The plaintiff descended the steps of the car, and was then carried into the station in a chair by his friends and the company's employees. For the alleged wrong done in not detaining the train at the first stoppage a sufficient length of time to enable the plaintiff to get off, the jury awarded the sum of \$3,275 as damages, which verdict the Supreme Court unhesitatingly set aside, remarking that this course ought to have been pursued in the case before noticed.¹

(6.) *For Injury to Passenger in Railroad Accident.* — The plaintiff, a passenger on defendant's railroad train, was injured in a railroad accident, and in consequence was confined from two to three weeks to his bed. When quiet, he did not suffer greatly from pain, and after that period he began to walk about, though with great difficulty, but did not resume business in his office for a period of three months thereafter; and at the time of the trial, thirteen months after the accident, he was still feeling some pain and inconvenience. Under these circumstances, it was held that if such temporary confinement and pain were the only consequences of the injury, a verdict of \$5,000 should be regarded as excessive. The proof, however, was conflicting as to whether the plaintiff was injured in the membraneous covering of the spine, or merely in the muscular ligaments connected with it. There was evidence from which a jury might conclude that the plaintiff would never entirely recover, the attending physician and two others testifying that, in their opinion, any future imprudence or unusual exposure might lead to very serious, and even fatal, results. The verdict was therefore permitted to stand.² In another case of this character, \$6,900 was deemed to be excessive damages where the injuries consisted of a variety of bruises about the head and shoulders, — none of them being of a serious character, — a scalp-wound which readily healed, and a shock to the nervous system. The plaintiff, shortly after the accident, admitted that she was not seriously injured, and commenced her avocation of teaching two or three months afterwards.³

The court thought that a verdict of \$11,000 should be reduced to \$5,000 as compensation for the following injuries: The plaintiff was somewhat injured about the head, but more seriously upon the foot, a portion of which had to be amputated. After the accident, the plaintiff became so seriously ill that his life was despaired of. He remained at the station to which he was conveyed subsequent to the accident, for a period of three months. At the expiration of this time the wounded limb was not entirely healed, and in this particular the plaintiff was crippled for life.⁴ So, the court ordered the damages to be reduced from a verdict of \$6,000 to \$4,000, where the plaintiff's leg was broken and some flesh-wounds were received upon the head during a collision of trains.

¹ New Orleans etc. R. Co. v. Statham, 42 Miss. 607.

² Pittsburgh etc. R. Co. v. Thompson, 56 Ill. 138.

³ Sawyer v. Hannibal etc. R. Co., 37 Mo. 240.

⁴ Collins v. Albany etc. R. Co., 12 Barb. 492.

Getting on and off Train.

The plaintiff was confined to his house for about five months, and obliged to go upon crutches for three or four months afterwards; and the injured limb, when healed, was somewhat shorter than the other, though the muscles were well developed and the plaintiff was restored to his wonted health.¹

A verdict of \$5,000 damages was held to be excessive where the plaintiff lost only one month's time in his business, and the injuries consisted of a straining of the ligaments of a finger of the right hand, resulting in some loss of power in the limb, some slight bruises, and a weakening of one lung, rendering the plaintiff more liable to pulmonary attacks.²

In an action for the breaking of the plaintiff's arm, the jury awarded excessive damages, which the trial court required the plaintiff to reduce by a *remittitur* to \$2,500. The Supreme Court of Illinois considered this to be a large award for the injury in question, but was not prepared to say that the judgment ought to be reversed on this account.³ On the contrary, the Canadian Court of Queen's Bench held that a new trial ought to be granted in a case where the record showed that a verdict of \$2,000 had been rendered for the breaking of the plaintiff's right arm, upon the testimony of persons who were not physicians. One witness testified that the plaintiff remained four weeks and a half at his house after the accident, which occurred on the 8th of January; that he was attended by two physicians; that he suffered greatly, and required attention night and day; that the plaintiff's arm was in a sling a month after he left the house; that the injured arm was a great deal smaller than the other; that, in the opinion of the witness, at the time of the trial the arm was useless. Another witness testified that the plaintiff carried his arm in a sling until February; that the right arm was of little use; that the plaintiff used his left arm because the right arm was paralyzed.⁴

(7.) *For Injury to Passenger getting on or off a Railroad Train.*—A passenger paid his fare to a small station, which was a wood and water station only, and the conductor agreed to put him off there. When the train got to the place it did not stop, but slackened up to allow him to jump off; but the passenger, being a heavy man, was afraid to get off, and went forward and told the conductor, who angrily blamed him, and who again slackened the train, whereupon he got off. In doing so he injured his ankle; and the jury, in an action for damages against the railroad company, gave a verdict in his favor for the sum of \$500. It was held that the amount was not excessive.⁵ In an action by a passenger against a railroad company, it appeared that the plaintiff, a physician of thirty years' standing, while on the defendant's car at a station where the train was waiting for the arrival of another train on a connecting road, and which the plaintiff intended to take to continue his journey, had occasion to step out of the car, and in doing so he fell into a ditch or sewer nine or ten feet deep below the step of the car, and broke his leg and was otherwise injured. The car was standing at or near the usual place of receiving and putting off passengers; it was at night; there were no stationary

¹ Clapp v. Hudson etc. R. Co., 19 Barb. 461.

² Union Pacific R. Co. v. Hand, 7 Kan. 380.

³ Chicago etc. R. Co. v. Pondrom, 51 Ill.

333. See also Chicago etc. R. Co. v. Hughes, 63 Ill. 170; Walker v. Erie R. Co., 63 Barb. 260.

⁴ Watson v. Northern R. Co., 24 Upper Canada Q. B. 98.

⁵ Georgia etc. R. Co. v. McCurdy, 45 Ga. 288.

Notes.

lights, and there were rocks, timbers, and oyster-shells in the bottom of the ditch into which he fell. The plaintiff used due care and caution in going down the car-steps, and, when he stepped off the last car-step, expected to put his feet on the ground instead of stepping into the ditch, of which he had no knowledge. The conductor of the defendant's train had known of the existence of the ditch for three years; it was afterwards filled up before the trial. The court refused to disturb a verdict for the plaintiff for \$10,000.¹ The plaintiff, on attempting to get on a train at midnight at the defendants' depot, fell through a bridge which was under the control of the defendants, which was undergoing repairs and was through their negligence left uncovered. The injuries thus occasioned were of a permanent character, leaving him a cripple for life. He had suffered pain and anguish, and been involved in large expenditures of money, but the evidence failed to disclose any wantonness or wilfulness on the part of the company. A verdict of \$25,000 was regarded as grossly excessive, and the judgment was reversed.² It appeared in an action by the plaintiff, a married lady, that she was a passenger on defendant's train, and on reaching her destination attempted to get off, but the cars did not stop more than a minute; that when the signal was given she started, with her child and some bundles, for the door, and meeting some persons coming on the cars she could not immediately get down the steps; that before she could get off, the cars were in motion, and she jumped off, and fell on the platform and was injured. The jury found a verdict for \$4,000 damages, which was reduced, on the suggestion of the trial court, to \$2,500. The court above refused to interfere, as the amount of the judgment was satisfactory, after the *remittitur*, to the judge who tried the case.³ Where the plaintiff, in order to get on a train, had to cross over a railroad track at night at a place where the track was usually crossed, there being no way of reaching the depot except by crossing a track, was run over by a train backing up which had no head-light and which did not ring the bell nor sound its whistle to give warning of its approach, and his foot crushed so that his leg had to be amputated, a verdict for \$8,000 damages, although thought by the appellate court to be large, was not disturbed, but the judgment thereon was affirmed.⁴

(8.) *For Injury to Passenger by Accident to Stage-Coach.*—Where a stage-coach, through the negligence of the driver, fell over a ledge down a ravine, and a passenger was very severely and dangerously injured, having his lower jaw broken in three places, the upper jaw separated from its bony attachment, his right shoulder dislocated and the right shoulder-blade broken, his skull fractured, his face, mouth, and body bruised, contused, and wounded, and his injuries were of so serious a character as to render him entirely insensible for a considerable time, and to render his recovery doubtful, and were such as to require the removal of portions of the lower jaw and to produce a great and permanent disfigurement; and it also appeared that before the accident the passenger, who was a laborer by occupation, was a strong, healthy man, but that up to the time of the trial, more than a year after the accident, he had not acquired the ordinary use of the lower jaw, his right shoulder and arm were stiff and weak, and his

¹ *Montgomery etc. R. Co. v. Boring*, 51 Ga. 582.

² *Lloyd v. Hannibal etc. R. Co.*, 53 Mo. 509.

⁴ *Whalen v. St. Louis etc. R. Co.*, 60 Mo.

² *Chicago etc. R. Co. v. Fillmore*, 57 Ill. 265. 323.

Accidents to Stage-Coaches.

right hand partially paralyzed, being unable to perform any labor except with his left hand, and the injuries were of such a character as to permanently impair his capacity for laborious pursuits, — it was held that a verdict of \$16,500 would not be set aside.¹ In an action against a proprietor of a stage-coach for the negligence of the driver whereby the coach was overturned and the plaintiff was injured, it appeared that the head of the plaintiff was severely cut, and one of his legs badly broken, — the smaller bone protruding through his clothing and boot. He was confined at a house near the place of the accident for six months, during which time he suffered very severely, and for a part of the time was occasionally delirious. At the time of the trial, which was a year after the occurrence, his leg was not entirely healed and was shortened; the ankle-joint was swollen and stiff and he was obliged to use crutches, and the physician who attended him expressed the opinion that the joint would continue to be stiff, and he would be a cripple for life. He was also subjected to considerable expense, having paid his physician's bill of \$280, and to the man at whose house he was confined, \$154.12. The jury gave a verdict in his favor of \$9,000, which the court refused to set aside, and the court above affirmed the judgment thereon.²

¹ *Boyce v. California Stage Co.*, 25 Cal. 460.

² *Farish v. Reigle*, 11 Gratt. 697.

INDEX.

ABATEMENT OF ACTIONS,

in suits against carriers. p. 546.

ABSENCE FROM CONVEYANCE,

temporary absence of passenger from the conveyance does not sever the relation of carrier and passenger. p. 50.

ACCIDENT, (*See NEGLIGENCE.*)

carrier not answerable for mere accident. *Christie v. Griggs*, p. 181.

ACCOMMODATIONS,

duty of railway companies to provide reasonable accommodations for passengers at their stations. *McDonald v. Chicago etc. R. Co.*, p. 93.

duty of carriers of passengers by sea as to the accommodations of passengers. p. 468.

ACTIONS, (*See PLEADING; PROCEDURE.*)

ACTIONS EX DELICTO, (*See PROCEDURE.*)

ADMIRALTY,

courts of, have jurisdiction over torts of passengers upon the high seas. *Chamberlain v. Chandler*, p. 459.

over contracts for the carriage of passengers by sea. p. 467.

and upon other navigable waters. pp. 543, 544.

ADVERTISEMENT, (*See TIME-TABLE.*)

ALLEGATA ET PROBATA,

variance between pleading and proof in actions against carriers. pp. 554-556.

ARM OUT OF WINDOW,

whether riding on a railway car with arm out of window is contributory negligence. p. 257.

ASSAULTS UPON PASSENGERS,

by other passengers; liability of the carrier for. pp. 303-305.

liability of carriers for assault upon passengers by their servants. pp. 352-377.

this liability arises out of the contract of carriage, but does not depend upon whether the servant was acting within the scope of his employment or not. *Pendleton v. Kinsley*, p. 352.

the carrier liable for the misconduct of his employee, whether arising from malice or neglect. *Ibid.*

no defence that the carrier did not authorize the acts of his employee. *Ibid.*

whether the carrier is liable for the wanton and malicious trespasses of his servants. p. 363.

ASSAULTS UPON PASSENGERS — *Continued.*

- cases which hold the carrier liable only when the servant was acting within the scope of his employment. p. 366.
- authority of the servants of the carrier to make arrests. p. 371.
- résumé* of the circumstances which will justify an ejection of the passenger. p. 375.
- whether person may be ejected from a railroad train at other places than at a station. p. 377.
- English cases holding carriers not responsible for unauthorized assaults by their servants. pp. 371-373.
- quantum of damages for assaults upon passengers by carrier's servants. p. 580.

ASSIGNMENT,

- right of action for loss of baggage assignable. p. 538.

ASSUMPSIT,

- lies against carrier for personal injuries. *McCall v. Forsyth*, p. 541; note, p. 544.

AXLE, (*See* LATENT DEFECTS.)

- liability for an injury caused by the breaking of an axle on account of frost. n. 216.

BAGGAGE,

- of passengers by water; general rule in respect to. p. 471.
 - act of Congress limiting liability of ship-owner for loss of. p. 530.
- duty of passenger in respect of, during transit. p. 530.
 - duty of passenger to claim, on arrival at port. p. 471.
- passenger may require his baggage to be deposited in a suitable place while at sea. p. 472.
- carriers of passengers are responsible as common carriers for the baggage of passengers. *Hollister v. Nowlen*, p. 489; note, p. 520.
- right of carrier to extra compensation for baggage of peculiar value. *New York etc. R. Co. v. Fraloff*, p. 502.
- fraud of passenger, in concealing among his baggage articles of great value, discharges carrier. *Id.*, p. 503.
- in the absence of fraud, passenger not bound to disclose value of baggage. *Id.*, p. 503.
- what is baggage. *Id.*, p. 503.
- whether a passenger has carried excess of articles in his baggage a question of fact. *Id.*, p. 503.
- what is baggage a mixed question of law and fact. p. 510.
- articles which cannot be considered baggage. p. 511.
- articles which are comprehended in the term "baggage." p. 512.
- custody of the baggage; booking and checking. p. 513.
- theft of baggage under the personal control of the passenger. p. 515.
- articles received in another capacity than as a carrier. p. 519.
- responsibility for extra baggage. p. 522.
- baggage of gratuitous passengers. p. 524.
- lien of the carrier upon the passenger's baggage for passage-money. p. 524.
- liability of carrier who carries baggage only. p. 524.

BAGGAGE — *Continued.*

- contracts limiting the liability of the carrier for the loss of baggage. *Hollister v. Nowlen*, p. 489; notes, pp. 471, 525.
- notices limiting such liability. p. 526.
- provision under this head of the English Railway and Canal Traffic Act. p. 526.
- what will constitute a sufficient notice. p. 526.
- exception under the Railway and Canal Traffic Act in case of excursion trains. p. 528.
- regulations of the carrier in respect of baggage. *Hollister v. Nowlen*, p. 489; *New York etc. R. Co. v. Fraloff*, p. 502; note, p. 529.
- notice to the passenger of such regulations. p. 529.
- liability of sleeping-car companies for the loss of baggage and valuables. p. 530.
- duty of the carrier to deliver baggage safely. p. 532.
- duty of the carrier to afford facilities for the delivery and storage of baggage at destination. p. 534.
- liability of the carrier where baggage is delivered upon a forged order. p. 536.
- measure of damages in actions for loss of baggage. p. 536.
- actions for loss of baggage; procedure and evidence in. pp. 537-539.
- parties to the action. p. 537.
- form of the action. p. 538.
- competency of the plaintiff as a witness to show the contents of the baggage. p. 538.
- burden of proof in such actions. p. 539.
- declarations of the carrier's servants. p. 539.

BAGGAGE-CAR,

- whether riding in the baggage-car of a passenger-train is contributory negligence. p. 262.

BARKEEPER,

- lessee of the bar on a steamboat, when deemed a passenger. p. 46.

BERTHS,

- rights of passengers upon steamboats, *inter se*, as to berths. p. 474.

BOOKING,

- booking baggage. p. 513.

BROKEN AXLE, (See LATENT DEFECTS.)

BROKEN RAIL, (See LATENT DEFECTS.)

- railway carrier not liable for the breaking of a sound rail in consequence of extreme frost. p. 220.

BROKEN WHEEL, (See LATENT DEFECTS.)

BURDEN OF PROOF. (See EVIDENCE.)

CABIN PASSENGERS,

- entitled to what accommodation and treatment. p. 469.

CARRIER OF PASSENGERS,

- who is a common carrier of passengers. pp. 26-28.
- street railway companies are carriers of passengers. p. 442.

CARRIER OF PASSENGERS — Continued.

- duty of carrier to receive and carry passengers. pp. 26-30.
- obligation to receive and carry. pp. 1-30.
- when the relation of carrier and passenger subsists. pp. 31-52.
- obligation to carry according to advertisement or contract. pp. 53-71.
- obligation to furnish safe and convenient stations and approaches. pp. 72-110.
- liability for negligence. pp. 111-242.
- regulations of. pp. 306-351.
- liability for assaults upon passengers by his servants. pp. 352-377.
- liability for personal injuries limited by contract. pp. 378-402.
- liability for consequential injuries to passenger where another's means of transportation are used. pp. 403-418.
- liability for damage to passenger through fault of connecting lines. pp. 419-437.
- street-railroad companies. 438-447.
- carrier of passengers by water. pp. 448-487.
- liability of, in respect of passenger's baggage. pp. 448-539.
- what will excuse the carrier from receiving and carrying. pp. 2-28.
 - want of room. p. 29.
 - non-payment of fare. p. 29.
 - that the passenger has been before rightfully expelled. pp. 22, 30.

CARRYING BEYOND DESTINATION,

- quantum of damages allowed for; illustration. p. 581.

CASE, (See PLEADING.)**CHARACTER,**

- when the character and circumstances of the plaintiff are an element of damage. p. 571.

CHECKING,

- checking baggage. p. 513.

CIVIL-RIGHTS LAW,

- provisions of, declaring all persons entitled to equal accommodations on public conveyances. p. 347.
 - constitutionality of the act denied. p. 347.
 - views of Erskine, J. p. 348.

CLASSIFICATION OF PASSENGERS,

- right of carrier to adopt regulations for the separation of passengers into separate vehicles. pp. 345, 350.
- classification according to sex. p. 345.
 - according to color. p. 346.

COLLISIONS OF VESSELS,

- parties to actions in case of injuries to vessels from collisions. p. 475.

COLORED PERSONS,

- right of carrier to exclude from the cabin of a steamboat. *Day v. Owen*, p. 306.
- power of carrier to separate colored persons from other passengers. p. 346.
- quantum of damages for refusing to permit colored persons to ride in particular cars. p. 580.

COMMON CARRIER, (See CARRIER.)

CONCURRENT NEGLIGENCE,

of the carrier and a third person, injuring the passenger. (*See* IMPUTED NEGLIGENCE.)

of the carrier and a passenger, injuring another passenger. (*See* IMPUTED NEGLIGENCE.)

of the passenger and the carrier. (*See* CONTRIBUTORY NEGLIGENCE.)

CONDUCT OF DEFENDANT,

when admissible in evidence. p. 558.

CONDUCT OF OTHER PASSENGERS,

whether admissible in evidence. p. 557.

CONDUCTORS,

of street-railway cars; duty of, to passengers when alighting. p. 443.

CONDUCTORS OF RAILWAY TRAINS,

how far passengers are excused in following the directions of conductors of railway trains. *Railroad Co. v. Jones*, p. 248.

represent the corporation. p. 369.

discretion of, in expelling persons from the train. p. 369.

CONNECTING LINES.

obligation to carry a passenger who proposes to take passage with a rival connecting line. *Bennett v. Dutton*, p. 2.

discontinuance of trains on connecting line, and excuse for failing to carry according to published time-table. p. 53.

liability for injuries to passengers where one carrier uses another's means of transportation. pp. 403-418.

liability of one railroad company for an injury to a passenger upon the track of a connecting line. *Great Western R. Co. v. Blake*, p. 403.

liability of a railway company for injury to their own passengers through the negligence of another company using their track. *McElroy v. Nashua R. Corp.*, p. 409.

general statement of liability where one carrier makes use of another's means of transportation. p. 412.

the carrier receiving the passenger is chargeable with negligence of the company whose line is used. p. 412.

rule where one carrier uses the line of another by statutory authority. p. 415.

parties to actions in such cases. p. 417.

application of the doctrine *respondereat superior* in such cases. p. 417.

the carrier who sells a ticket over a connecting line is liable for the default of the owner of such line. *Candee v. Pennsylvania R. Co.*, p. 419.

a modified rule; the liability to be determined by the contract of transportation. *Quimby v. Vanderbilt*, p. 423.

liability of a carrier who makes a contract for transportation over lines not his own. p. 431.

doctrine that a through-ticket is a distinct contract of each carrier. p. 433.

liability of the carrier on whose line the loss or injury occurred. p. 434.

partnership of carriers. p. 436.

limitation of the carrier's liability by contract or notice for losses occurring on other lines. p. 437.

CONSIDERATION,

the confidence induced by undertaking any service for another, as to carrying him without his paying fare, is a sufficient legal consideration to create a duty in performing it. *Philadelphia etc. R. Co. v. Derby*, p. 31.

pecuniary consideration not necessary to create an obligation to carry safely.

Ibid.; *Steamboat New World v. King*, p. 175.

negligence in persons exercising skill. *Steamboat New World v. King*, p. 175.

CONSTITUTIONAL LAW, (See CIVIL-RIGHTS LAW.)

statute of Louisiana prohibiting carriers from making discrimination of color, unconstitutional. p. 346.

CONTRACT OF CARRIAGE, (See TICKET; EXCURSION TICKET.)

liability of a carrier for failure to transport the passenger according to the terms of the contract of carriage. p. 65.

failure of vessel to land and take on passengers. pp. 65, 66.

liability for carrying a passenger beyond his destination. p. 66.

obligation of passenger to ascertain what train will stop at his destination. p. 66.

obligation of carrier to furnish passenger with a seat. p. 67.

duty of carrier by water to convey passenger to the port to which he has contracted to carry him. p. 465.

rules which apply in the construction of contracts for the carriage of passengers by sea. p. 467.

CONTRACTOR,

negligence of contractors who construct or repair the carrier's vehicles, road-bed, and other physical appliances, imputable to the carrier. pp. 220-222.

carrier liable for an injury to a passenger in consequence of one of its contractors engaging in work near the track. p. 222.

CONTRACTS LIMITING LIABILITY,

contracts limiting the liability of carriers for personal injuries to passengers. pp. 378-402.

right of the carrier of passengers to stipulate against liability for personal injuries. *Railway Co. v. Lockwood*, p. 378.

cannot stipulate against liability for negligence. *Ibid.*

such a stipulation in a drover's pass, void. *Ibid.*; note, p. 400.

validity of contracts limiting the liability of carriers to passengers travelling upon free passes. p. 399.

what negligence is covered by such a release. p. 402.

contracts and notices limiting the liability of carriers for losses and injuries happening upon connecting lines. p. 437.

power of carrier to limit liability for baggage by contract. *Hollister v. Nowlen*, p. 489.

for loss of passengers' baggage. pp. 471, 525.

notice limiting such liability. p. 526.

CONTRIBUTORY NEGLIGENCE,

passenger leaping from stage-coach under an impulse of fear produced by a sudden peril, not chargeable with contributory negligence. *Ingalls v. Bills*, p. 112; *Stokes v. Saltonstall*, p. 183; *Jones v. Boyce*, p. 240.

of passenger in attempting to board train at a station where a train does not stop. p. 226.

CONTRIBUTORY NEGLIGENCE — *Continued.*

passenger injured while upon the railway track. p. 233.

the doctrine of contributory negligence stated and applied to the carriage of passengers. *Morrissey v. Wiggins Ferry Co.*, p. 243.

the doctrine that there can be no recovery where a passenger is in the least fault, denied. *Ibid.*

if the passenger's negligence was the remote and the carrier's negligence the immediate cause of the accident, the passenger may recover. *Ibid.*

whether, notwithstanding the imprudence of the passenger, the carrier could have avoided the injury, a question for the jury. *Ibid.*

instances of contributory negligence on the part of the passenger. pp. 246, 257-270.

leaping from stage-coach which seems about to overturn. *Jones v. Boyce*, p. 246; *Stokes v. Saltonstall*, p. 183; *Ingalls v. Bills*, p. 112.

riding on the pilot of a locomotive. *Railroad Co. v. Jones*, p. 248.

leaping from a railway train while in motion. *Railway Co. v. Aspell*, p. 252.

riding on a railway train with arm out of window. pp. 257, 258.

riding upon the platform of a railway car. pp. 259-261.

riding upon the platform of a street-railway car. p. 261.

riding in a baggage-car. p. 262.

standing in the passage-way of a car. p. 263.

leaning against the side door of an English railway car. p. 263.

injury while endeavoring to shut the door of an English railway car. p. 263.

riding with hand upon the frame-work of the door of a railway car, and injured by the door being shut. p. 264.

injury while attempting to pass from one car to another by the direction of a servant of the company. p. 264.

drover riding on the top of the train. pp. 265, 266.

passenger standing under a suspended boat on a steamboat. p. 266.

rushing back into burning train to recover baggage. p. 266.

leaping off railway cars while in motion. pp. 227, 228, 266.

alighting at an improper place. pp. 232, 233.

running alongside a moving train and endeavoring to climb upon it. p. 267.

leaping from a street car while in motion. pp. 268, 444.

leaving train in the night and walking into an open cattle-guard. p. 269.

falling into other dangerous places in leaving trains at night. p. 269.

leaving trains by an unusual and unprovided way. pp. 269, 270.

passing over railway track in leaving train. p. 269.

care exacted of passengers in Massachusetts while on the company's track. p. 269.

getting upon a street car from the side upon which there is another track. p. 444.

standing upon the front platform of a street car. *Wilton v. Middlesex R. Co.*, p. 438; *Burns v. Bellefontaine R. Co.*, p. 411; note, p. 444.

getting on and off street car by the way of the front platform. p. 445.

riding in a street car with arm out of window. p. 446.

CONTRIBUTORY NEGLIGENCE — *Continued.*

- pedestrian crossing over the platform of a street car when a car obstructs the passage of street. p. 447.
- attempting to crawl through a freight-train which blocks up the way. p. 270.
- contributory negligence of passengers laboring under disabilities. pp. 270-272.
- duty of the carrier toward such passengers. pp. 270-272.
- putting a lunatic off the train, who was subsequently killed by being run over by another train. p. 271.
- degree of care due to passengers who are intoxicated. p. 271.
- care required of passengers of defective eyesight. pp. 271, 272.
- no excuse that the impaired faculties of the passenger materially contributed to injuries received in consequence of the carrier's negligence. p. 272.

CORPORATIONS,

- measure of damages in case of, same as in case of persons. p. 570.
- liable for exemplary damages. p. 575.

COUNTS, (*See* PLEADING.)COURT AND JURY, (*See* LAW AND FACT.)

DAMAGES,

- damages recoverable for future pain and suffering. *Curtis v. Rochester etc. R. Co.*, p. 189.
- measure of damages for expulsion of passenger from railway train. *Chicago etc. R. Co. v. Parks*, p. 319.
- measure of damages in actions for loss of baggage. p. 536.
 - the fair market value of the property. p. 536.
 - expenses incurred in the search. p. 537.
 - interest on the damages. p. 537.
- Iowa statute imposing penalty of three dollars a day where traveller is detained. p. 537.
- difference in measure of damages between actions *ex contractu* and actions *ex delicto*. p. 545.
- how pleaded. p. 550.
 - special damages must be alleged. p. 550.
- all damages, present and prospective, may be recovered. p. 564.
- damages in case of permanent injury. p. 565.
- computation of damages from life-tables. p. 565.
- damages must be obvious, and not conjectural or speculative. p. 565.
- enhancement of damages by the subsequent conduct of the party injured. p. 565.
 - as where a passenger is not taken on board a train, and walks to his destination. p. 565.
- whether sickness or other injuries incurred by the passenger in consequence of not being carried to his destination, or being unlawfully put off the carrier's vehicle, constitute an element of damages. pp. 565-570.
- damages for expulsion from ship. p. 567.
- damages for failure or refusal to carry. p. 568.
- damages for delays in making transit. p. 569.
- loss of customers and injuries to business. p. 568.

DAMAGES — Continued.

- damages for wrongful expulsion of passengers. pp. 561, 570.
- damages for refusal to furnish cars for excursion parties, according to contract. p. 570.
- the same rules of damages applied to corporations as to individuals. p. 570.
- elements of damage: the loss of time — inability to attend to business — pecuniary expenses — bodily pain — incurable hurt — personal inconvenience — mental anguish, etc. pp. 570, 571.
 - wealth of the defendant. p. 571.
 - character and circumstances of the plaintiff. p. 571.
 - disfigurement of the person. p. 571.
 - expenses of litigation. p. 571.
 - value of gratuitous nursing. p. 571.
- damages which may be recovered by husband and wife jointly. p. 572.
 - which parent may recover for injury to child. p. 572.
- circumstances mitigating the damages. p. 572.
- exemplary damages may be awarded, when. p. 573.
 - when corporations are liable for. p. 575.
- questions of law and questions of fact, touching exemplary damages. p. 576.
- when judgment will be reversed on account of excessive damages. p. 576.
- illustrations of verdicts for damages which have been allowed to stand, and which have been set aside as excessive. pp. 577-585.
 - for wrongfully ejecting passengers. p. 577.
 - for removing a passenger from a train at a place not a regular station. p. 579.
 - for refusing to admit colored passengers to ladies' car. p. 580.
 - for assaults upon passengers by the carrier's servants. p. 580.
 - for carrying passengers beyond destination. p. 581.
 - for injury to passengers in railroad accidents. p. 582.
 - for injury to passengers in getting on and off railroad trains. p. 583.
 - for injury to passengers by accidents to stage-coaches. p. 584.
 - reduced from \$4,000 to \$50, for putting ashore a passenger who came on board to go to a city from whence he had been exiled by a vigilance committee. *Pearson v. Duane*, p. 17.

DEATH,

- pleading under statutes giving a right of action for damages resulting in death. p. 549.

DECLARATIONS, (See EVIDENCE.)**DEGREE OF CARE, (See NEGLIGENCE.)****DELIVERY,**

- what constitutes a delivery of baggage to the carrier. p. 514.
- duty of carrier to deliver baggage safely. p. 532.
- what constitutes a delivery of baggage by the carrier. p. 533.
- delivery to the passenger's agent. p. 533.
- what constitutes arrival at destination. p. 533.
- liability of the carrier when the baggage is carried beyond destination. p. 533.
- effect of delivery and redelivery for safe-keeping. p. 534.
- duty of carrier to afford facilities for delivery and storage. p. 534.
- duty of passenger to receive his baggage at destination. p. 534.
- liability of carrier for unclaimed baggage. p. 535.

DELIVERY — *Continued.*

- what is reasonable time for removal of baggage. p. 535.
- within what time the passenger must claim his baggage. p. 536.
- what, if a train arrives on Sunday. p. 536.
- circumstances excusing the passenger from claiming baggage. p. 536.
- delivery of baggage on a forged order. p. 536.

DEMURRER TO EVIDENCE,

- practice under. p. 563.

DEPOTS AND GROUNDS, (*See RAILWAY STATIONS.*)

DISFIGUREMENT OF PERSON,

- damages for. p. 571.

DROVER'S PASS,

- rights and immunities of persons riding upon drover's pass. p. 44.
- drovers travelling on passes are passengers for hire. *Railroad Co. v. Lockwood*, p. 378; but see note, pp. 400, 401.
- a condition in such a pass that the holder of it waives all claims for damages for personal injuries, is void. p. 378.

DRUNKENNESS,

- stage proprietor furnishing a known drunkard for a driver is liable for exemplary damages. p. 239.

DRUNKEN PERSONS,

- railway company not bound to receive and carry. *Vinton v. Middlesex R. Co.*, p. 6.
- duty of carrier in case of having on board drunken, disorderly, and dangerous persons. p. 302.

EMPLOYEES OF CARRIER,

- distinction between the degree of care which a carrier owes his servants and that which he owes his passenger. p. 46.
- when deemed a passenger and when not. pp. 46, 47.
- servants of carrier riding from home to their work, and from their work home, are not deemed passengers. pp. 46-48.
- otherwise in case of a carpenter employed in erecting a bridge. pp. 48, 49.
- employee travelling on his own business is a passenger. p. 49.
- injured while riding on the pilot of the locomotive cannot recover damages of the company. *Railroad Co. v. Jones*, p. 248.

EMPLOYEE'S PASS,

- admissibility of, as evidence. p. 51.

EQUALITY,

- of passengers in respect to accommodations. pp. 345-350.

EVIDENCE,

- burden of proof under act of Congress relating to vessels propelled by steam. *Steamboat New World v. King*, p. 175.
- breaking of carrier's vehicle *prima facie* evidence of negligence. *Christie v. Griggs*, p. 181.
- presumption of negligence from the overturning of the carrier's vehicle. p. 183.

EVIDENCE — *Continued.*

the mere fact that an accident has happened to the carrier's vehicle, without more, held not *prima facie* evidence of negligence. *Curtis v. Rochester etc. R. Co.*, p. 188.

the accident must be of such a nature that it was the duty of the carrier to guard against it. *Ibid.*

as where a railway train runs off the track. *Ibid.*

competency of plaintiff to show contents of packages of lost baggage. p. 538.

burden of proof in such actions. p. 539.

declarations of the carrier's servants in such action. p. 558.

points of evidence in actions against carriers. p. 562.

presumptions — *prima facie* proof of negligence. pp. 209–214, 556.

want of skill in the carrier's servant. p. 556.

declarations of the plaintiff to his physician. p. 557.

declarations made at the time of the accident. p. 557.

conduct of other passengers. p. 557.

conduct of the defendant. p. 558.

statements of the defendant's servants. p. 558.

where the servant is the managing agent, or vice-principal. p. 559.

testimony of experts. p. 559.

opinions of non-experts. p. 560.

other matters. p. 560.

EXCESSIVE DAMAGES,

when appellate courts will reverse judgments on account of. p. 576.

EXCESSIVE FORCE,

carrier liable where his servant, in executing his duty, uses excessive force. pp. 373, 374.

EXCURSION TICKET,

liability of a railway company for failing to bring back a passenger according to the terms of an excursion ticket. *Hawcroft v. Great Northern R. Co.*, p. 59.

EXCURSION TRAINS,

liability of railway companies for loss of baggage on excursion trains. p. 528.
power to limit such liability by notice. p. 528.

EXEMPLARY DAMAGES, (See DAMAGES.)**EXPENSES OF LITIGATION,**

whether an element of damages. p. 571.

EXPERTS,

testimony of, in actions against carriers. p. 559.

EXPRESS MESSENGER,

injury to person about becoming express messenger, "learning the run." p. 45.

EXPULSION OF PASSENGER,

circumstances may exist which will not warrant the expulsion of a passenger after he has been received, although they would have warranted a refusal to receive and carry him. *Pearson v. Duane*, p. 17; note, p. 30.

EXPULSION OF PASSENGER — *Continued.*

carrier not bound to receive a passenger who has already been rightfully expelled. *O'Brien v. Boston etc. R. Co.*, p. 22.

prohibited by statute in Illinois, except at regular stopping-places. p. 319.

measure of damages where a person is expelled between stations. p. 319.

résumé of circumstances justifying the expulsion of passenger from carrier's vehicles. p. 375.

circumstances justifying the expulsion of passengers from railway trains. p. 377.

expulsion of the passenger for refusal to pay fare. p. 340.

discrimination between the price of tickets purchased at the company's office and rate of fare paid upon the train. p. 341.

statute of New York prohibiting railway companies from exacting greater fare than that allowed by law. p. 342.

regulations restraining the transportation of passengers upon freight-trains. p. 343.

who are to be deemed such passengers. p. 344.

classification of passengers. pp. 345-350.

according to sex. p. 345.

according to color. p. 346.

exclusion of runners from carrier's vehicles and premises. p. 350.

expulsion from street-railway cars while in motion. p. 443.

passenger may not be expelled from vessel after it has put out to sea. p. 465.

quantum of damages for. pp. 577-579.

where the expulsion is at a place not a regular station. p. 579.

EXTRA BAGGAGE,

responsibility of carrier for. p. 522.

EXTRA COMPENSATION,

carrier may demand, for baggage of excessive value. *New York etc. R. Co. v. Fraloff*, p. 502.

EXTRAORDINARY CARE,

a carrier of passengers is bound to extraordinary care for the safety of his passengers. pp. 200-205.

rule of extraordinary care applies only to injuries during the transit, and not to defects in the carrier's depots and grounds. p. 209.

it does not apply to visible defects in the carrier's means of transportation. p. 212.

nor where the occasion was, in whole or in part, some active movement of the passenger. p. 214.

nor where it grew out of something wholly disconnected with the carrier's business. p. 214.

FOREIGN ADMINISTRATOR,

when, may sue carrier in domestic tribunals. p. 547.

FORM OF ACTION, (*See PROCEDURE.*)

FRAUD,

of passenger in concealing in his baggage articles of great value, discharges liability of carrier. p. 503.

FREE PASSENGERS,

- passengers riding free with the carrier's consent, entitled to the same measure of care as paying passengers. *Philadelphia etc. R. Co. v. Derby*, p. 31.
- carrier liable to, for injury through culpable negligence or want of skill. *Nolton v. Western R. Corp.*, p. 37.
- when entitled to the same measure of care as passengers for hire, and when not. pp. 43-45.
- proprietor of a steamboat liable for the negligent injury of a steamboatman who, according to a custom, was permitted to ride on a boat without paying fare. *Steamboat New World v. King*, p. 175.
- validity of contracts limiting the liability of carriers to passengers travelling upon free passes. p. 399.
- liability of carrier for loss of baggage of. p. 524.

FREIGHT-TRAINS,

- degree of care required in the transportation of passengers on freight-trains. p. 234.
- conveniences on such trains. p. 234.
- means of getting on and off such trains. p. 234.
- passengers upon, not presumed to have knowledge of regulations forbidding their presence there. *Dunn v. Grand Trunk R. Co.*, p. 328.
- receiving passenger on such train and collecting first-class passenger fare of him makes the carrier liable to him the same as though it were a passenger-train. *Ibid.*
- regulation that passengers coming upon, must first procure tickets. p. 343.
- who are to be regarded as passengers upon. p. 344.
- expulsion of passengers from, a ground of punitive damages. p. 344.

FROST,

- liability for an injury caused by the breaking of an axle on account of frost. p. 216.
- railway company not liable for the breaking of a sound rail in consequence of extreme cold. p. 220.

GAMBLERS,

- no obligation to receive and carry a gambler who seeks to take passage for the purpose of plying his vocation. *Thurston v. Union Pacific R. Co.*, p. 10.

GETTING ON AND OFF TRAINS,

- quantum of damages allowed for injuries in. p. 583.
- (See also CONTRIBUTORY NEGLIGENCE.)

GOLD AND SILVER,

- liability of carrier for loss of money transported as baggage. p. 511.

HIGH SEAS, (See PASSENGERS BY WATER.)

HUSBAND AND WIFE,

- who may sue for loss of wife's paraphernalia. p. 537.
- action by husband for loss of wife's baggage. p. 547.
- action by wife in her own name. p. 547.

IDENTITY OF CARRIER AND PASSENGER, (See IMPUTED NEGLIGENCE.)

IDENTITY OF CHILD WITH CUSTODIAN, (*See* IMPUTED NEGLIGENCE.)

IDENTITY OF LUNATIC WITH CUSTODIAN, (*See* IMPUTED NEGLIGENCE.)

IDIOTS, (*See* NON SUI JURIS; CONTRIBUTORY NEGLIGENCE.)

IMPUTED NEGLIGENCE,

application of the doctrine of, in the carriage of passengers. pp. 273-305.

negligence of the manufacturer of the carrier's vehicles imputed to the carrier.

Hegeman v. Western R. Corp., p. 160.

application of the doctrine of imputed negligence in the carriage of passengers.
pp. 273-294.

that a passenger who is injured by the negligence of a third person is precluded
from recovering by the contributory negligence of his own carrier. *Thorogood v. Bryan*, p. 273.

this doctrine denied. *Bennett v. New Jersey etc. R. Co.*, p. 281.

the doctrine of imputed negligence considered; proper scope of the rule. p.
284.

the case of *Thorogood v. Bryan* doubted in subsequent English cases. p. 284.
and not followed in some of the cases. pp. 285, 286.

but subsequently reasserted. p. 287.

the American decisions on the subject conflicting. pp. 288-290.

effect of the negligence of a stranger concurring with negligence of the carrier,
to the injury of a passenger. p. 290.

when children and persons of unsound mind are passengers, the negligence of
their custodian is imputed to the passenger. pp. 291-294.

other cases illustrative of the rule. p. 294.

INJURIES TO PASSENGERS,

liability for injuries to passenger while getting on and off of vessel. p. 472.

INSPECTION,

carrier under a continuing duty of inspection and repair. p. 221.

INSURERS, (*See also* NEGLIGENCE.)

carrier of passenger not answerable as an insurer. *Readhead v. Midland R.
Co.*, p. 124; *Stokes v. Saltonstall*, p. 183.

overruled cases holding carriers of passengers liable as insurers, considered.
p. 198.

carriers of passengers not warrantors of their vehicles and roads, but liable
only for negligence. p. 199.

they must use extraordinary care. pp. 200-205.

except in England, where they are held only to reasonable care.
p. 206.

but extraordinary care, in the view of some courts, means
no more than reasonable care applied to the circumstances
of the case. p. 207.

INTENTION,

whether the relation of carrier and passenger subsist is to a great extent a
question of intention on the part of the alleged passenger. p. 43.

INTOXICATION,

railroad company not bound to receive and carry drunken persons. *Vinton v.
Middlesex R. Co.*, p. 6.

JOINT AND SEVERAL LIABILITY.

of carriers for injuries to passengers. p. 545.

JURISDICTION,

courts of admiralty have jurisdiction over torts of passengers upon the high seas. pp. 459, 544.

of suits against carriers. p. 543.

of State courts in case of injury on a railroad leased by a foreign corporation. p. 543.

removal to the Federal courts in such cases. p. 543.

State jurisdiction over injuries happening upon inland waters. p. 543.

JURY, (See LAW AND FACT.)**LADIES' CAR,**

right of carrier to provide a separate car for ladies and their attendants, and to exclude male passengers therefrom. *Bass v. Chicago etc. R. Co.*, p. 311; note, p. 345.

what if there be no sitting room in other coaches. p. 345.

LATENT DEFECTS,

carrier liable for defects in his physical appliances, though latent, if the same might have been discovered by the most careful and thorough inspection. *Ingalls v. Bills*, p. 112.

stage proprietor not liable for the breaking of an iron axletree from a defect which cannot be discovered by an extraordinary examination. *Ibid.*

railway company not answerable for injury to passenger caused by the breaking of a wheel in consequence of a secret air-bubble, which cannot be prevented by any known means of manufacture nor discovered by any known test. *Readhead v. Midland R. Co.*, p. 124.

liability of the carrier for accident caused by latent defects in his vehicle, roadway, or other physical appliances. pp. 215-218.

LATEST IMPROVEMENTS,

whether a carrier of passengers is bound to adopt the latest improvements. pp. 160, 215.

LAW AND FACT,

it is a question for the jury whether a carrier has been negligent in not discovering and adopting the latest improvements to promote the safety of his passengers. p. 160.

whether a passenger has carried an excess of baggage, a question of fact. *New York etc. R. Co. v. Fraloff*, p. 502.

what is baggage — a question of law and fact. p. 510.

what constitutes a delivery of baggage a question of fact. p. 514.

when the question of the carrier's negligence is a question of law for the court, and when a question of fact for the jury. pp. 552, 553.

province of court and jury as to the question of exemplary damages. p. 576.

LEAPING FROM STAGE, (See CONTRIBUTORY NEGLIGENCE.)

whether the act of a passenger in leaping from a stage-coach while in motion is contributory negligence. *Jones v. Boyce*, p. 246.

LEAPING FROM TRAIN,

whether contributory negligence in passenger to leap from train in motion. pp. 226-229, 252.

LESSEES,

liability of railroad companies for injuries by their lessees in operating their road. p. 418.

of bar on steamboats are entitled to the rights of passengers. p. 463.

LIEN,

of carrier upon baggage for payment of fare. p. 524.

LIFE-TABLES,

when damages are computed from. p. 565.

LORD CAMPBELL'S ACT,

pleading under statutes giving a right of action for injuries resulting in death. p. 549.

LUNATICS, (See NON SUI JURIS; CONTRIBUTORY NEGLIGENCE.)**MAIL AGENT,**

not in a strict sense a passenger. *Nolton v. Western R. Corp.*, p. 37. But see note, p. 45.

carrier not bound to award him the high degree of care which springs out of the contract of carriage. *Ibid.*

but is liable to him if he is injured through gross negligence. *Ibid.*

MANUFACTURER,

negligence of the manufacturer of the carrier's appliances imputable to the carrier. pp. 220-222.

MANUFACTURE OF VEHICLES.

carrier not answerable for secret defects in the manufacture of his vehicles not preventable by any known means, nor discoverable by any known test. *Ingalls v. Bills*, p. 112; *Readhead v. Midland R. Co.*, p. 124; *Hegeman v. Western R. Corp.*, p. 160.

but carrier not exonerated from the fact that he purchased the vehicle from an extensive and skilful manufacturer, if the defect could have been discovered by the manufacturer by the application of any test known to persons skilled in such business. *Hegeman v. Western R. Corp.*, p. 160.

MASTER AND SERVANT,

carrier not bound to the same care toward his servants as toward his passengers. p. 46.

not liable for an injury to one servant from the negligence of another servant. p. 46.

circumstances which constitute an employee of the carrier a passenger for the time being. pp. 46-48.

the principle governing the liability of a master for wrongs done by his servant does not apply to assaults upon passengers by the servants of carriers. *Pendleton v. Kinsley*, p. 352.

whether carriers are bound by the wanton and malicious trespass of their servants. p. 363.

views of Ryan, C. J. p. 363.

views of Shaw, C. J. p. 364.

conclusion drawn from the rule that the carrier is liable for the good conduct even of strangers. p. 364.

MASTER AND SERVANT— *Continued.*

- views of Walton, J. p. 365.
- recent doctrine in Massachusetts. p. 366.
- cases which hold the carrier not liable unless the servant is acting within the scope of his employment. pp. 366-371.
- authority of the servants of carriers to make arrests. p. 371.
- English cases holding railway companies not liable for unauthorized arrests by their servants. pp. 371-373.
- carrier liable where his servant, in executing his duties, uses excessive force. pp. 373, 374.
- whether master may sue carrier for injuries to his servant. p. 546.

MASTERS OF VESSELS,

- when obliged to receive and carry passengers beyond the seas. *Benett v. Peninsular etc. R. Co.*, p. 448.
- summary and absolute authority of, during voyage. p. 459.
- duty of, towards passengers during the voyage, and liability of, for violation of such duty. *Ibid.*
- is a common carrier, although making a voyage to a foreign country. p. 462.
- has absolute control over passengers in every thing relating to order and safety. p. 470.

MERCHANTS' SHIPPING ACT,

- limitation of the carrier's liability by the English Merchants' Shipping Act. p. 474.

MERE ACCIDENT,

- carrier not answerable for mere accident. *Christie v. Griggs*, p. 181.
- (See NEGLIGENCE.)

MITIGATION OF DAMAGES,

- circumstances which will be looked to in mitigation of damages. p. 572.

MONEY,

- liability of carrier for loss of money transported as baggage. p. 511.

MONTE-MEN,

- no obligation to receive and carry gamblers who seek to ply their vocation. *Thurston v. Union Pacific R. Co.*, p. 10.

MUTINY,

- passenger endeavoring to incite, may be put in irons. p. 470.

NEGLIGENCE,

- the rule that there are three degrees of negligence, denied. *Steamboat New World v. King*, p. 175.
- negligence in employments which require skill. *Ibid.*
- breaking of carrier's vehicle is *prima facie* evidence of negligence. *Christie v. Griggs*, p. 181; *Stokes v. Saltonstall*, p. 183; *Curtis v. Rochester etc. R. Co.*, p. 188; note, pp. 209, 556.
- what will rebut this presumption. p. 183.
- liability of the carrier for injuries to his passenger through his negligence. pp. 111, 242.
- degree of care imposed upon a carrier in respect of his vehicle and appliance. *Ingalls v. Bills*, p. 112; *Readhead v. Midland R. Co.*, p. 124.
- carrier not answerable for mere accident. *Christie v. Griggs*, p. 181.

NEGLIGENCE — *Continued.*

- not an insurer. *Stokes v. Saltonstall*, p. 183; note, p. 198.
- not a warrantor of his vehicles and roads, but liable only for negligence. p. 199.
 - degree of care required of railway carriers of passengers. *Hegeman v. Western R. Corp.*, p. 160.
- not answerable for breaking, through secret defects. *Ingalls v. Bills*, p. 124.
- responsible for the utmost care and skill in the manufacture of his vehicles. *Hegeman v. Western R. Corp.*, p. 160.
 - liable for the negligence of the manufacturer. *Ibid.*
 - no defence that the vehicle was purchased from an extensive manufacturer, of skill and reputation. *Ibid.*
 - whether the carrier has been guilty of negligence in not ascertaining the utility of, and adopting, a recent improvement in vehicles, designed to advance the safety of travellers, is a question for the jury. *Ibid.*
- carriers of passengers by steam held to the greatest possible degree of diligence, and any negligence is deemed gross. *Philadelphia etc. R. Co. v. Derby*, pp. 31, 34; *Steamboat New World v. King*, p. 175.
- carrier bound to use extraordinary care. pp. 200–205.
 - general expression of this doctrine. p. 200.
 - expressions in railway cases. p. 200.
 - expressions in stage-coach cases. p. 204.
 - expressions in steamboat cases. p. 205.
 - modified expression of this rule in American cases. p. 206.
- the English rule that of reasonable care. p. 206.
- American expressions of the English rule. p. 207.
- limitations upon the rule of extraordinary care. p. 209.
- presumption of negligence from the happening of the accident. p. 209.
- exceptions to the rule that the happening of the accident is *prima facie* proof of negligence. pp. 212–214.
- duty of the carrier to adopt the latest improvements. p. 215.
- accidents from latent defects in vehicles. p. 215.
- accidents from defects in the carrier's roadway. p. 218.
- negligence of the manufacturer imputed to the carrier. p. 220.
- the obligation of the carrier, how far affected by the statute. p. 222.
- duties of railway carriers. p. 224.
 - must afford a reasonable time for passengers to get on and off. p. 225.
 - must not injure passengers in getting on and off by shunting trains upon them. p. 226.
 - must announce the name of the station on arrival. p. 226.
 - must give passenger a reasonable opportunity to alight. p. 227.
 - must not let the train overshoot or fall short of the platform at the station. p. 228.
 - effect of an invitation to alight, express or implied. p. 229.
 - injuries to passengers upon a railway track. p. 233.
 - degree of care required in the transportation of passengers on freight-trains. p. 234.
- duties of stage proprietors. pp. 235–242.
 - the law as laid down by Mr. Justice Story. p. 235.

NEGLIGENCE — *Continued.*

- duty to furnish competent drivers. p. 233.
- care and vigilance exacted of the driver. p. 239.
- driver approaching dangerous place must warn passengers. p. 240.
- carrier answerable for negligence of driver until passenger is set down at his destination. p. 241.
- over-loading of carrier's vehicle. p. 242.
- gross negligence a relative term, depending upon the circumstances of each case. *Nolton v. Western R. Corp.*, p. 37.
- distinction between the degree of care which a carrier owes his servants and that which he owes his passenger. p. 46.
- carriers of passengers bound to extraordinary care, and liable for slight neglect. p. 243.
- carrier not bound to provide at all events against injuries to passengers by other passengers, but must exercise the best efforts to that end. *Pittsburgh etc. R. Co. v. Hinds*, 295; note, p. 301.
- what negligence is covered by a condition in a free pass releasing liability for personal injuries. p. 402.
- the obligation to use due care continues where a carrier makes use of another carrier's means of transportation. *Great Western R. Co. v. Blake*, p. 403.
- railway carriers bound to the most exact care and diligence. *McElroy v. Nashua etc. R. Corp.*, p. 409.
- railroad companies responsible for the careful management of a switch by which another road connects with theirs, although such switch is under the management of the servants of the other road. *McElroy v. Nashua etc. R. Corp.*, p. 409.
- railroad company using the road of another company is chargeable with the negligence of the latter company. p. 412.
- what, if the road of the other company is used under statutory authority. p. 415.
- carrier receiving passengers from coaches on another line responsible to them for negligent injuries. p. 417.
- liability of ship-owner for injuries to passengers while embarking or disembarking. p. 472.
- duty to warn passengers of danger in such cases. p. 472.
- not bound to provide means for embarking and disembarking except at such times as he is ready to receive passengers. p. 473.
- evidence of means of embarking and disembarking established on other vessels. p. 473.
- expert testimony as to a particular means established. p. 473.
- right of passenger to disembark where the boat touches at a port temporarily. p. 473.
- presumptions of negligence in actions against carriers. pp. 181, 183, 183, 209, 556.
- what amounts to *prima facie* proof of negligence in such cases. p. 556.
- burden of proof in such cases. p. 556.

NEGROES,

- quantum of damages for refusing to permit colored persons to ride in particular cars. p. 580.

NEW JERSEY,

construction of statute limiting liability of railway companies for baggage. p. 528.

NEWSBOY,

boarding cars with acquiescence of carrier's servant, not a passenger. p. 46.

NON SUI JURIS,

contributory negligence of passengers under disabilities. pp. 270-272.
duties of carriers towards such passengers. pp. 270-272.

NOTICE,

limiting carrier's liability for loss of baggage. p. 526.
what will constitute a good notice. p. 526.

(See CONTRACTS LIMITING LIABILITY.)

NAVIGABLE WATERS,

jurisdiction in case of injuries to passengers upon. p. 543.
(See PASSENGERS BY WATER.)

OBLIGATION TO CARRY ACCORDING TO ADVERTISEMENT OR CONTRACT, pp. 52-71.

failure of railway company to transport according to advertised time-tables. *Denton v. Great Northern R. Co.*, p. 53.

failure of a railway company to transport according to special contract. *Hawcroft v. Great Northern R. Co.*, p. 59.

railway ticket for one part of route not good for another part. *Great Western R. Co. v. Pocock*, p. 63.

what a railway ticket is. p. 65.

failure to transport according to contract. p. 65.

carrying passenger beyond his destination. p. 66.

duty of passenger to ascertain what train will stop at his destination. p. 66.

duty of railway carrier to provide passengers with seats. p. 67.

duty of railway carrier to run trains on schedule-time. p. 67.

special contracts increasing carrier's liability. p. 68.

contracts to transport over another line. p. 69.

right of passenger to stop off and resume journey on the same ticket. p. 69.

OBLIGATION TO RECEIVE AND CARRY, pp. 1-30.

a general obligation to receive and carry. *Bennett v. Dutton*, p. 2; note, p. 28.
obligation to carry passenger who proposes to take passage by a rival line.

Ibid.

not bound to carry drunken persons. *Vinton v. Middlesex R. Co.*, p. 6.

nor gamblers whose purpose it is to ply their vocation. *Thurston v. Union Pacific R. Co.*, p. 10.

nor drummers for a rival line. *Jencks v. Coleman*, p. 11.

refusal of a ship-master to bring back a passenger exiled by a vigilance committee. *Pearson v. Duane*, p. 17.

quantum of damages in such a case. *Ibid.*

not bound to carry passenger who has been rightfully ejected from carrier's vehicle. *O'Brien v. Boston etc. R. Co.*, p. 22.

carrier may make regulation for ejection of persons who refuse to pay fare. *Ibid.*

OBLIGATION TO RECEIVE AND CARRY — Continued.

- want of room will excuse carrier from receiving passenger. p. 29.
- payment or tender of fare a condition precedent to the right to be carried. p. 29.
- under certain circumstances, carrier may not eject passenger who has been received, although he might have refused to carry him in the first instance. p. 30.
- in case of vessels making foreign voyages. *Benett v. Peninsular etc. Co.*, p. 448; note, p. 464.

OPINIONS OF WITNESSES,

- opinions of expert witnesses in actions against carriers. p. 559.
- opinions of non-expert witnesses. p. 560.

OVERLOADING,

- liability of stage proprietor for overloading. pp. 241, 242.

OVERRULED CASES,

- overruled cases holding carriers of passengers liable as insurers, considered. p. 198.

PAIN AND SUFFERING,

- damages recoverable for future pain and suffering. *Curtis v. Rochester etc. R. Co.*, p. 189.

PARENT AND CHILD,

- father may sue for loss of child's baggage. p. 537.
- whether parent may sue carrier for injuries to child on account of loss of service. p. 546.

PARTICULARITY OF STATEMENT, (See PLEADING.)

PARTIES TO ACTIONS,

- in case of injuries to passengers from collision of vessels. p. 475.
- in suits against carriers. p. 546.
 - master or parent, for loss of service of servant or child. p. 546.
 - foreign administrator. p. 547.
 - husband for wife. p. 547.
 - wife in her own name. p. 547.
 - assignee of cause of action. p. 547.

PARTNERSHIP,

- in case of the partnership of carriers, the partners are jointly and severally liable for torts committed upon passengers. p. 436.
- an arrangement between connecting lines to carry passengers on through tickets does not constitute a partnership within this rule. p. 436.

PASSAGE-MONEY,

- when may be recovered back. p. 466.

PASSENGER, (See FREE PASSENGER.)

- contributory negligence of. pp. 243-272.
- circumstances which create the relation of carrier and passenger. p. 42.
 - hailing an omnibus. p. 42.
 - checking baggage. p. 42.

PASSENGER — *Continued.*

- not necessary that the contract should be consummated by payment of fare on entering the vehicle. pp. 43, 463.
- persons going into waiting-room to become passengers are deemed such. p. 43.
- how far a question of intention. p. 43.
- trespassers on carrier's vehicle not entitled to the same measure of care as passengers. p. 43.
- not necessary that money should be paid to constitute a passenger for hire. p. 45.
- illustrations: drovers attending cattle; persons carrying on business on carrier's vehicle. p. 45.
- express-messengers on railway trains. p. 45.
- person about to become express messenger, on board for the purpose of "learning the run." pp. 45, 46.
- lessee of the bar of a steamboat. pp. 45, 463.
- boy on railway train. p. 46.
- newsboy coming on train to sell papers. p. 46.
- temporary absence of passenger from the conveyance does not sever the relation of carrier and passenger. p. 50.
- evidence as to who is a passenger. p. 51.
- presumption that every one on the conveyance is a passenger. p. 51.
- admissibility of employee's pass. p. 51.
- evidence to show that a train is a passenger-train. p. 51.
- person employed on a private car. p. 52.
- slaves carried for hire. p. 52.
- who is to be deemed a passenger on board a ship on the high seas. p. 463.
- status of soldiers being transported on shipboard. p. 463.
- person who has entered to take passage, but who has not paid fare. pp. 43, 463.
- duty of, in respect to the care of his baggage during the transit. p. 530.

PASSENGERS BY WATER,

- the duties and obligations of carriers of passengers by water. p. 448-487.
- duty of carriers of passengers making voyages beyond seas, to receive and carry. *Benett v. Peninsular etc. Co.*, p. 448.
- jurisdiction of courts of admiralty over torts of passengers upon the high seas. *Chamberlain v. Chandler*, p. 459; note, p. 468.
- the summary and absolute authority of the masters of vessels. *Ibid.*; note, p. 470.
- what conduct of masters of vessels towards passengers may be actionable. *Ibid.*
- both the owner and master of a ship are common carriers, even in respect of passengers carried to a foreign country. p. 462.
- who is a passenger on board of a ship navigating the high seas. p. 463.
- status of soldiers who are being transported on shipboard. p. 463.
- status of the lessee of a bar on a steamboat. p. 463.
- when the master of a vessel may refuse to receive passengers. p. 464.
- when a passenger may be expelled from a vessel. p. 465.
- when passage-money may be recovered back. p. 466.
- construction of contracts for carriage of passengers by water. p. 467.
- duty of carriers by water as to the accommodation and treatment of passengers. p. 468.
- authority of the master of a vessel over passengers. pp. 459, 470.

PASSENGERS BY WATER—Continued.

right of passengers to salvage. p. 470.

baggage of passengers by water. p. 471.

contract against liability for loss of. p. 471.

passenger must demand baggage within a reasonable time after arriving at port. p. 471.

at sea, may require baggage to be deposited in suitable place. p. 472.

injuries to passengers getting on and off vessel. p. 472.

duty of carrier to warn passengers of danger in disembarking. p. 472.

carrier not required to provide means for embarking, except when he is receiving passengers. p. 473.

evidence of means for embarking and disembarking used on other vessels. p. 473.

opinions of experts as to the feasibility of such means. p. 473.

rights of passengers *inter se* to berths on steamboats. p. 474.

duty of carrier as affected by quarantine. p. 474.

limitation of carrier's liability by the English Merchants' Shipping Act. p. 474.

parties to action in case of injury to passenger by collision of vessel. p. 475.

statutes of the United States affecting carriers of passengers by water. pp. 475-487.

historical sketch of these statutes. p. 475.

condensed statement of the provisions of the act of February 28, 1871. p. 476.

condensed statement of the provisions of the act of March 3, 1855. p. 478.

review of cases construing the foregoing acts. p. 479.

act of March 2, 1819. p. 479.

act of March 3, 1855. p. 479.

acts of July 7, 1838, and August 30, 1852. p. 480.

act of July 4, 1864. p. 481.

act of July 25, 1866. p. 482.

act of February 28, 1871. p. 482.

limitation of carrier's liability by the act of March 3, 1851. p. 483.

scope of this act. p. 484.

its application to passenger-carriers in respect of a passenger's baggage. p. 485.

jurisdiction in certain cases under this act. p. 486.

PASSENGER-TRAIN,

evidence to show that a particular train is a passenger-train. p. 51.

PAYMENT OF FARE, (See TICKETS.)

right of railway company to adopt regulations requiring conductors to expel persons who refuse to pay their fare, and not to receive them on board after they have been so expelled. *O'Brien v. Boston etc. R. Co.*, p. 22.

payment of or readiness to pay fare a condition precedent to the right to be carried. p. 29.

right of carrier to require passengers to purchase tickets before entering train, and to charge the highest rate of fare where this is not done. *Chicago etc. R. Co. v. Parks*, p. 319.

refusal to pay fare justifies expulsion of passenger. p. 340.

whether the carrier can exact a greater price where a ticket is not purchased at the station. p. 341.

PEDDLERS,

carrier not obliged to furnish facilities on his vehicles for trafficking purposes.
p. 351.

PERSONS ATTENDING PASSENGERS,

conflict of authority as to the duty which the carrier owes to persons attending passengers arriving and departing. pp. 49, 50.

PLATFORM,

whether riding on a platform of a railway car is contributory negligence. p. 259.

injuries to passengers while riding upon the front platform of street-railway cars. *Wilton v. Middlesex R. Co.*, p. 438; *Burns v. Bellefontaine R. Co.*, p. 441; note, pp. 444-447.

PLEADING,

it is not sufficient to allege in a defensive pleading that the vehicle which broke was purchased from a competent manufacturer; the pleader must state that the manufacturer himself was not guilty of negligence in making it. p. 221.

counts in the declaration in actions against carriers. p. 547.

particularity of statement in the declaration or complaint. p. 547.

in actions *ex delicto*. p. 547.

in actions *ex contractu*. p. 549.

allegations under statute giving a right of action where the damages resulted in death. p. 549.

allegation of the carrier's duty. p. 550.

allegation of damages. p. 550.

special damages must be alleged. p. 550.

whether the plaintiff must deny contributory negligence. pp. 551-553.

particularity of statement in the defensive pleadings. p. 554.

variance between the allegations and proof. p. 554.

illustrations. p. 555.

POLICE DUTIES OF THE CARRIER,

duty to protect passengers by proper police regulations. *Pittsburgh etc. R. Co. v. Hinds*, pp. 295-301.

duty of passengers to subordinate themselves to such regulations. *Ibid.*; *Bass v. Chicago etc. R. Co.*, p. 311.

carrier not bound to provide against injuries to passenger at all events, but must exhaust every measure to further the safety of passengers. p. 295.

caution required of carrier in maintaining order on his vehicle. p. 301.

duty in case of intoxicated, disorderly, and dangerous passengers. p. 302.

duty in case passengers use profane language and are guilty of other improprieties. p. 303.

liability of carriers for injuries to passengers in consequence of failure to execute proper police regulations. pp. 303-305.

PREMIUM,

for the carriage of baggage may be in proportion to its value. p. 489; *New York etc. R. Co. v. Fraloff*, p. 503.

PRESUMPTION, (*See EVIDENCE.*)

of negligence in actions against carriers. pp. 181, 183, 188, 209, 556.

PRESUMPTIVE DAMAGES,
when recoverable. p. 564.

PRIMA FACIE EVIDENCE, (*See NEGLIGENCE.*)
of negligence in actions against carriers. pp. 181, 183, 188, 209, 556.

PRIVATE CAR,
persons carried upon, not strictly passengers. p. 52.

PRIVATE INTERNATIONAL LAW, (*See JURISDICTION.*)

PROCEDURE,
parties to actions for loss of baggage. p. 537.
father may sue for child's baggage. p. 537.
whether husband sues for wife's baggage. p. 537.
assignee of claim for lost baggage may sue. p. 538.
form of action at common law for loss of baggage. p. 538.
foreign attachment does not lie in Pennsylvania in actions for loss of baggage.
p. 538.
actions against carriers *ex contractu* or *ex delicto*. *McCall v. Forsyth*, p. 541;
note, p. 544.
form of the action against carriers for injuries to passenger, trespass or case.
p. 545.
abatement and revival of actions. p. 546.
who may sue. p. 546.
master or parent, for loss of service of servant or child. p. 546.
foreign administrator. p. 547.
husband for wife. p. 547.
wife in her own name. p. 547.
assignee of the cause of action. p. 547.

PROVINCE OF COURT AND JURY, (*See LAW AND FACT.*)

PROXIMATE AND REMOTE CAUSE,
remote negligence of passenger no bar to a recovery for the carrier's negligence, if the immediate cause of the accident. *Morrissey v. Wiggins Ferry Co.*, p. 243.

QUARANTINE,
obligations of carriers, how affected by quarantine regulations. p. 474.

RAILROAD ACCIDENTS, (*See NEGLIGENCE.*)
quantum of damages allowed for injuries in. p. 582.

RAILWAY CARRIERS,
bound to use the greatest care, and liable for the slightest negligence. pp. 200,
204.
duty of railway carriers of passengers in general. p. 224.
duty to establish reasonable rules and regulations. p. 224.
duty not to overload their carriages. p. 224.
duty to afford passengers reasonable time to get on and off. pp. 225-227.
duty to announce the names of stations. p. 226.
duty to stop train at stations so as not to overshoot the platform. p. 228.
invitation to passenger to alight, express or implied. p. 229.

RAILWAY CARRIERS — *Continued.*

- what will constitute an implied invitation to alight, a source of controversy. p. 230.
 - calling out the name of the station. p. 231.
 - guard opening the door. p. 231.
- liability for injuring passengers, by the running of trains, who are obliged to pass over several tracks in leaving the cars. p. 233.
- degree of care required in the transportation of passengers on freight-trains. p. 234.
 - conveniences on such trains. p. 234.
 - means of getting on and off such trains. p. 234.

RAILWAY COMPANY,

- when not deemed a common carrier of passengers. p. 29.
- circumstances justifying the expulsion of passengers from railway trains. p. 377.

RAILWAY CROSSING,

- right of a pedestrian to cross from the platform of a street car when it is obstructing the crossing. p. 447.

RAILWAY STATIONS,

- injuries to passengers from defects or obstructions in and about railway stations. pp. 72–110.
 - passenger opening door of the wrong room, and injured by falling down a stairway. *Toomey v. London etc. R. Co.*, p. 72.
 - passenger injured by falling over weighing-machine left on the platform. *Cornman v. Eastern Counties R. Co.*, p. 76.
 - passenger killed through the faulty construction of a bridge at the railway station. *Longmore v. Great Western R. Co.*, p. 81.
 - passenger injured by falling over some hampers which obstructed the path of egress from the train on a dark night. *Nicholson v. Lancashire etc. R. Co.*, p. 85.
 - passenger injured by falling down a slippery staircase at a railway station. *Crafter v. Metropolitan R. Co.*, p. 88.
 - duty of a railway company to provide reasonable accommodations for its passengers at its stations. *McDonald v. Chicago etc. R. Co.*, p. 93.
 - passenger injured by defective platform, in entering the cars at an unusual place and in advance of time. *Ibid.*
 - duty of companies to keep all portions of their platform and approaches to their cars in a safe condition. *Ibid.*
 - passenger injured by railway station-house being blown down by a storm. *Pittsburgh etc. R. Co. v. Brigham*, p. 101.
 - the extent of the duty of the carrier to maintain safe station-houses, platforms, and grounds, discussed. p. 104.
 - passenger bitten by a stray dog at a railway station no evidence of negligence. p. 105.
 - to whom the railway company owes the duty of keeping its depot, houses, and grounds in a safe condition. pp. 105, 106.
 - to persons having duties to perform in connection with the arrival and departure of passengers. p. 105.
 - but not to mere trespassers and licensees. pp. 105, 106.
 - illustrations of negligence in this particular. p. 107.

RAILWAY STATIONS — *Continued.*

- failure to keep its stations lighted at night. pp. 108, 109.
- suffering snow and ice to accumulate on platforms. p. 110.
- injuring passengers at stations by misplacing switch and shunting a train upon the wrong track. p. 110.

REASONABLE CARE,

- English doctrine of reasonable care applicable to carriers of passengers. p. 206.
- American expressions of the same doctrine. p. 207.
- illustrations of the English doctrine of reasonable care as applied to railway carriers. pp. 217, 218.

REGULATIONS OF THE CARRIER. (*See also* POLICE DUTIES OF THE CARRIER.)

- right of the carrier to make reasonable rules and regulations for the accommodation of passengers. *Day v. Owen*, p. 306.
- reasonableness of such regulations a mixed question of law and fact. *Id.*, 307; *Bass v. Chicago etc. R. Co.*, p. 311.
- how such regulations are pleaded. *Ibid.*
- exclusion of colored passengers from the cabin of a steamboat. *Day v. Owen*, p. 306.
- reasonableness of a regulation reserving a separate car for ladies and their attendants. *Bass v. Chicago etc. R. Co.*, p. 311.
- such a regulation cannot be enforced if there is not sufficient room for passengers in other cars. *Ibid.*
- discrimination between price of tickets and fares paid on train. *Chicago etc. R. Co. v. Parks*, p. 319.
- expulsion of passengers for refusal to comply with such a regulation. p. 319.
- measure of damages for such expulsion. p. 319.
- passengers upon freight-trains not presumed to have knowledge of regulations forbidding their presence there. *Dunn v. Grand Trunk R. Co.*, p. 328.
- power of the carrier to establish regulations considered. p. 335.
- regulations as to the exhibition and delivery of tickets. p. 336.
- passenger riding without ticket, or without a proper ticket. p. 337.
- regulations as to the carriage of passenger's baggage. *Hollister v. Nowlen*, p. 489; *New York etc. R. Co. v. Fraloff*, pp. 502, 523.
- notice to passengers of such regulations. p. 529.
- such regulations must be reasonable. p. 530.

RELATION OF CARRIER AND PASSENGER,

- when the relation of carrier and passenger subsists. pp. 31-52.
- passengers riding free. *Philadelphia etc. R. Co. v. Derby*, pp. 31, 43; *Steamboat New World v. King*, p. 175.
- what constitutes gratuitous carriage. p. 45.
- mail-agents upon railway trains. *Nolton v. Western R. Corp.*, p. 37.
- the relation of carrier and passenger arises, how. p. 42.
- consummation of the contract not necessary. p. 43.
- persons carrying on business on a carrier's vehicles or vessels. p. 45.
- employees of the carrier. p. 46.
- persons attending passengers arriving or departing. p. 49.
- persons employed on a private car. p. 52.
- slaves carried for hire. p. 52.

RELATION OF CARRIER AND PASSENGER—*Continued.*

- passengers temporarily absent from the conveyance. p. 50.
- evidence as to who is a passenger. p. 51.
- burden of proof in such cases. p. 51.
- admissibility of employee's pass. p. 51.
- evidence to show that a train is a passenger-train. p. 51.
- ceases when, in case of carriage on street railways. p. 446.

RELEASE, (*See CONTRACTS LIMITING LIABILITY.*)REMEDIES, PROCEDURE, AND DAMAGES,
considered. pp. 540-585.RES GESTÆ, (*See EVIDENCE.*)RESPONDEAT SUPERIOR, (*See MASTER AND SERVANT.*)

- carrier responsible for negligence of servant, although acting against his express orders. *Philadelphia etc. R. Co. v. Derby*, p. 31.
- carrier not liable to one servant for an injury through the negligence of a fellow-servant. p. 46.
- liability of carrier for the acts of his servants in respect of passenger's baggage. p. 519.

RETURN OF PASSAGE-MONEY,

- return of the passage-money after the passenger has been injured does not affect the previous relation of carrier and passenger. p. 44.

RIVAL LINES,

- obligation to carry a passenger who proposes to take passage with a rival connecting line. *Bennett v. Dutton*, p. 2.
- no obligation to carry a drummer for a rival line. *Jencks v. Coleman*, p. 11.

ROADWAY,

- railway carriers liable for defects in their roadway. pp. 218-220.
- duty to widen embankments. p. 219.
- to maintain a safe gate or cross-bar at crossings. p. 219.
- to maintain a road-bed of sufficient strength to resist unusual storms. p. 219.
- but not storms of unprecedented violence. p. 219.
- not liable for the breaking of a sound rail in consequence of extraordinary cold. p. 220.

RULES, (*See REGULATIONS OF THE CARRIER.*)

- power of a railway company to make rules and regulations respecting the time, mode, and place of entering its cars. *McDonald v. Chicago etc. R. Co.*, p. 93.

RUNNERS AND DRUMMERS,

- right of carrier to exclude, from his vehicles and premises. p. 350.

SALVAGE,

- right of passengers to salvage. p. 470.

SAMPLES,

- liability of carrier for loss of samples transported as baggage. p. 511.

SCHEDULE-TIME, (*See TIME-TABLE.*)

- duty to give publicity to changes in time-tables. p. 68.

SECRET DEFECTS, (*See LATENT DEFECTS.*)

SLAVES.

carried for hire, deemed passengers. p. 52.

SLEEPING-CAR COMPANIES,

liability of, for loss of baggage and valuables. p. 530.

a sleeping-car not an inn. p. 531.

owners of, must keep a watch and exercise care while guests are asleep. p. 531.

theft of passengers' baggage while those in charge of the car are absent or asleep. p. 531.

liability of the proprietors of such cars extends to what baggage. p. 532.

SPECIAL DAMAGES, (*See DAMAGES.*)SPECULATIVE DAMAGES, (*See DAMAGES.*)

STAGE-COACH,

passenger injured by leaping from stage-coach. *Ingalls v. Bills*, p. 112; *Stokes v. Saltonstall*, p. 183.

contributory negligence of passenger in leaping from stage-coach. *Jones v. Boyce*, p. 246.

stage-coach law. pp. 235-242.

quantum of damages allowed for injuries in stage accidents. p. 583.

STAGE PROPRIETORS,

bound to use the utmost care and vigilance. pp. 204, 205.

duties and obligations of, in the carriage of passengers. pp. 235-242.

the law on this subject as laid down by Mr. Justice Story. pp. 235-238.

duty to furnish competent drivers. p. 238.

furnishing a known drunkard for a driver, is liable for exemplary damages. p. 239.

responsible for negligence of driver employed to take the place of one who is sick. p. 239.

care and faithfulness exacted of the driver. p. 239.

where two courses are open, the driver is bound to adopt the one which is the least perilous. p. 240.

driver bound to the strictest care and the most unremitting vigilance. p. 240.

must warn passengers when approaching place of danger. p. 240.

obligation in this regard continues from the time the passenger is taken on board till he is set down at the end of his journey. p. 241.

is not excused in negligently injuring passengers who persist in riding on the outside. p. 241.

must not overload his vehicle. p. 242.

STATIONS AND APPROACHES,

obligation of the carrier to furnish safe and convenient stations and approaches. pp. 72-110.

injuries to passengers from defects in carrier's railway stations and grounds. *Toomey v. London etc. R. Co.*, p. 72; *Cornman v. Eastern Counties R. Co.*, p. 76; *Longmore v. Great Western R. Co.*, p. 81; *Nicholson v. Lancashire etc. R. Co.*, p. 85; *Crafter v. Metropolitan R. Co.*, p. 88; *McDonald v. Chicago etc. R. Co.*, p. 93; *Pittsburgh etc. R. Co. v. Brigham*, p. 101.

passenger opening wrong door and falling down stairs. *Toomey v. London etc. R. Co.*, p. 72.

STATIONS AND APPROACHES — *Continued.*

- passenger falling over weighing-machine on platform. *Cornman v. Eastern Counties R. Co.*, p. 76.
- death of passenger from defective bridge at railway station. *Longmore v. Great Western R. Co.*, p. 81
- egress from railway train obstructed, injuring passenger. *Nicholson v. Lancashire etc. R. Co.*, p. 85.
- passenger injured upon slippery staircase at railway station. *Crafter v. Metropolitan R. Co.*, p. 88.
- railway company bound to provide reasonable accommodations for passengers at railway stations. *McDonald v. Chicago etc. R. Co.*, p. 93.
- may make rules as to passengers entering cars; effect of such rules. *Ibid.*
- liability of such company for injury to a passenger through defective platform. *Ibid.*
- injury to a passenger in consequence of a railway station-house being blown down by a storm. *Pittsburgh etc. R. Co. v. Brigham*, p. 101.
- extent of the duty of railway companies to provide safe stations and approaches. p. 104.
- case of a passenger bitten by a stray dog at a railway station. p. 105.
- to whom the carrier owes this duty. p. 105.
 - does not owe it to mere licensees. p. 106.
 - otherwise to persons coming to assist the departure of passengers. p. 106.
- liability where two railway companies own two adjoining stations, which the passengers use indifferently. p. 106.
- other illustrations of negligence in this particular. p. 107.
- duty to keep stations lighted. p. 108.
- injury to passenger from falling into an excavation on a dark night. pp. 108, 109.
- passenger injured by reason of snow and ice on platform. p. 110.
- brakeman throwing burning stick of wood from the train and injuring passenger. p. 110.
- passenger running to escape unexpected train, and injured. p. 110.

STATUTES,

- act of Congress relating to vessels propelled by steam; burden of proof under. p. 175.
- statutes affecting the obligation of carriers considered. pp. 222-224.
- compliance with the requirements of a statute designed to promote the safety of passengers will not alone exonerate the carrier. p. 222.
- Federal statutes for the security of the lives of passengers on board of vessels propelled in whole or in part by steam. pp. 222-224.
- failure to comply with the requirements of a statute is negligence *per se*. p. 223.
- limitation of the carrier's liability by the English Merchants' Shipping Act. p. 474.
- statutes of the United States affecting carriers of passengers by water. p. 475.
 - historical sketch of such statutes. p. 475.
 - condensed statement of the provisions of the act of February 28, 1871. p. 476.
 - condensed statement of the provisions of the act of March 3, 1855. p. 478.
 - review of the cases considering the foregoing acts. pp. 479-482.
 - act of March 2, 1819. p. 479.

STATUTES — Continued.

- act of March 3, 1855. p. 479.
- act of July 7, 1838. p. 480.
- act of August 30, 1852. p. 480.
- act of July 4, 1864. p. 481.
- act of July 25, 1866. p. 482.
- act of February 28, 1871. p. 482.
- limitation of carrier's liability by the act of March 3, 1851. pp. 483-487.
- scope of this act. p. 484.
- its application to passenger-carriers in respect to passengers' baggage. p. 485.
- jurisdiction under it in certain cases. p. 486.
- English Railway and Canal Traffic Act. 526.
- construction of New Jersey statutes limiting liability of railway company for baggage. p. 528.
- notices limiting liability for baggage under English Railway and Canal Traffic Act. p. 528.
- act of Congress limiting liability of ship-owners for passengers' baggage. p. 530.
- Iowa statute imposing penalty of three dollars a day where traveller is detained. p. 537.

STEAM, (See STATUTES.)

- degree of care exacted of carriers who carry passengers by steam. *Philadelphia etc. R. Co. v. Derby*, p. 31; *Steamboat New World v. King*, p. 175.
- Federal statutes for the security of the lives of passengers on board of vessels propelled in whole or in part by steam. pp. 222-224.

STEAMBOATS, (See PASSENGERS BY WATER; NEGLIGENCE.)

- proprietors of, bound to use every precaution which human skill, care, and foresight can provide. p. 205.

STEERAGE-PASSENGERS,

- entitled to what accommodations and treatment. p. 468.

STORMS,

- railway company must maintain a road-bed of sufficient strength to resist storms of unusual force, but not storms of unprecedented violence. pp. 219, 220.

STOWAWAY,

- not entitled to the same measure of care as a passenger. p. 43.

STREET-RAILWAY COMPANIES,

- liability of, for injuries to passengers. pp. 438-447.
- whether it is within the scope of the employment of a driver to permit a person to ride upon the platform without paying fare. *Wilton v. Middlesex R. Co.*, p. 438.
- liability of the company where such a passenger is injured through negligence. *Ibid.*
- contributory negligence of the passenger in riding upon the front platform of a car. *Burns v. Bellefontaine R. Co.*, p. 441.
- street-railroad companies are carriers of passengers. p. 442.
- ejecting person from street car while in motion. p. 443.
- duty of conductor toward passengers when alighting. p. 443.

STREET-RAILWAY COMPANIES— *Continued.*

- duty of passenger to notify conductor or driver of intention to alight. p. 443.
- getting on street car from the side upon which there is another track. p. 444.
- passenger injured while standing upon the platform of a car. p. 444.
- passenger getting on and off the car by way of the front platform. p. 445.
- passenger injured by his arm projecting from the window. p. 446.
- when the relation of carrier and passenger ceases. p. 446.
- injury to pedestrians at street-crossings. p. 447.
- passenger on street car not chargeable with negligence of the driver for injury by colliding with a railway train. *Bennett v. New Jersey R. etc. Co.*, 231.
- cases holding company not liable for malicious conduct of driver in driving against street passengers. p. 371.

SUNDAY,

- carrier not bound to carry on Sunday. p. 29.

THEFT,

- of baggage which is under the personal control of the passenger. p. 515.

THROUGH TICKETS, (*See* CONNECTING LINES.)**TICKET,** (*See* PAYMENT OF FARE.)

- a railway ticket for one part of a route does not entitle the holder to travel over another part of the route for which the same fare is charged. *Great Western R. Co. v. Pocock*, p. 63.
- what a passage ticket is; its legal effect. p. 65.
- is a token rather than a contract. *Quimby v. Vanderbilt*, p. 423.
- right of traveller to stop off and resume journey on the same ticket. p. 69.
- tickets limited to a certain period of time. p. 70.
- regulations of railway carriers as to the exhibition and delivery of tickets. p. 336.
- English statutes upon this subject. p. 337.
- passengers riding without a ticket, or with an improper ticket. p. 337.
- if not purchased at the station, a carrier may exact a greater price for the passage. p. 341.
- but must provide passengers with a convenient opportunity for the purchase of tickets. p. 341.
- rule when the office of the carrier is closed. p. 342.
- New York statute upon the subject. p. 342.

TIME-TABLE,

- liability of a railway company for failing to transport a passenger according to its advertised time-table. *Denton v. Great Northern R. Co.*, p. 53.
- obligation of a railway company to run its trains according to its advertised schedule-time. p. 67.

TRAIN-BOY,

- when deemed a passenger. p. 46.

TREATMENT OF PASSENGERS, (*See* ACCOMMODATIONS.)

- duty of carriers of passengers by water as to the treatment of their passengers. p. 468.

TRESPASS, (*See FORM OF ACTION.*)

TRESPASSERS,

trespassers on carrier's vehicle not entitled to the same measure of care as passengers. p. 43.

VARIANCE,

between pleading and proof in actions against carriers. pp. 554-556.

VEHICLE AND ROADWAY,

liability of the carrier for injuries to passengers through defects in his vehicle or roadway. pp. 215, 224.

VERDICTS,

for excessive damages not allowed to stand. p. 576.

illustrations. pp. 577-586.

VIGILANCE COMMITTEE,

whether ship-master is bound to keep on board a person who has been exiled by a vigilance committee, and who nevertheless seeks to return. *Pearson v. Duane*, p. 17.

WANT OF ROOM,

want of room in the carrier's vehicle will generally excuse failure to carry. p. 29.

exceptions to this. p. 29.

WANT OF SKILL,

in the carrier's servant, how proven. p. 556.

WAREHOUSEMAN,

when the responsibility of a carrier is that of a warehouseman. p. 519.

WARRANTORS, (*See INSURERS.*)

WATER, (*See PASSENGERS BY WATER.*)

WEALTH OF DEFENDANT,

not an element of damage. p. 571.

WITNESS, (*See EVIDENCE.*)



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